In the Court of Appeal of Alberta

Citation: RM v JS, 2013 ABCA 441

Date: 20131218
Docket: 1201-0315-AC
Registry: Calgary

Between:

R.M. (also known as R.S.)

Appellant (Applicant)

- and -

J.S.

Respondent (Respondent)

The Court:

The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Alan Macleod

Memorandum of Judgment

Appeal from the whole of the Order by
The Honourable Madam Justice C.L. Kenny
Dated the 30th day of October, 2012
(2012 ABQB 669, Docket: FL01-14683)

Memorandum of Judgment

The Court:

I. Introduction

[1] The respondent father failed to return his then 9-year-old son, who was visiting with him in Calgary, to his custodial mother who resides in East Jerusalem. The appellant mother brought an application under the *Hague Convention* for the boy's return. A Provincial Court judge found the father's failure to return the child was wrongful, but he gave effect to the child's objection to return to live with his mother in Israel and refused the application.

[2] The mother appealed to the Court of Queen's Bench, but a judge of that court gave deference to the Provincial Court judge's discretion and denied the mother's appeal. The mother now appeals to this Court.

[3] For the reasons which follow, we allow the appeal and direct that the child be returned to the custody of his mother.

II. Background Facts

[4] The parties are the parents of the boy who was born on February 10, 2002 in Jerusalem, Israel. They are of Arab ethnicity and Muslim faith. They were married in Jerusalem on April 19, 2001 and continued to reside there until they separated in September 2006. At that time, the father immigrated to Canada, leaving the child in the care and custody of his mother.

[5] The parties were divorced in the Shari Court of Jerusalem in 2008. The divorce judgment does not speak to custody; however, the child continued to reside with the mother in Jerusalem with the understanding that he would spend the summer holidays with his father, now residing in Calgary, Alberta.

[6] Although born in Israel, the child does not have Israeli citizenship. It appears his status in Israel is that of an Arab national with residency. The father, who has both Lebanese and Canadian citizenship, arranged for him to obtain Canadian citizenship.

[7] The child spent his summer holidays in Canada in 2009 and 2010, and the father returned him to Jerusalem in accordance with the understanding between the parties. When the child traveled to Calgary in 2011, however, the father did not return him to Israel at the end of the summer. He remains in Calgary.

[8] The mother applied for the child's return pursuant to the *International Child Abduction Act*, RSA 2000, c I-4 which implements the *Hague Convention on the Civil Aspects of International Child Abduction*, commonly referred to as the *Hague Convention*.

III. The *Hague Convention*

[9] The terms of the Convention relevant to this application, follow:

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

[10] It is common ground that Israel is a Contracting State for purposes of enforcing the Convention.

IV. Judgment Below

A. Provincial Court of Alberta

[11] The judgment of the Provincial Court judge is lengthy and sets out the factual circumstances in detail: *JS v RM*, 2012 ABPC 184, [2012] 12 WWR 135. The judge found:

(i) the last habitual residence of the child was East Jerusalem in the State of Israel. The mother was therefore entitled to seek the return of the child under the Convention;

(ii) the mother was exercising rights of custody at the time of the retention of the child by the father;

(iii) the father acted "wrongfully" within the meaning of the Convention when he did not return the child to the mother in the Fall of 2011;

(iv) the fact that the child is a Canadian citizen and travels on a Canadian passport is "important, but is not a decisive factor" on the application;

(v) the return to Israel did not give rise to a grave risk that the child would be exposed to physical or psychological harm or otherwise place the child in an intolerable situation; and

(vi) the child had made a mature and strong objection to being returned to East Jerusalem, and that he was of an age [10 years, 4 months by the date of the decision], and degree of maturity, that it was appropriate to take his views into account. (para 104).

[12] The judge concluded as follows (paras 105-106):

> I have reached the clear conclusion that this is a case where the views of the child should be taken into account and that those views have not been coerced.
>
> Therefore, I decline to make an order for return of NS to East Jerusalem, in the State of Israel.

B. Court of Queen's Bench

[13] The mother's appeal was dismissed: *RM v JS*, 2012 ABQB 669, [2013] 3 WWR 411. The Queen's Bench judge carefully reviewed the judgment of the Provincial Court judge and concluded that his findings were reasonable, with the result that the appellant had not met the high standard of review required to overcome his exercise of discretion (paras 20-22).

V. Ground of Appeal

[14] The mother's principal grounds of appeal are: (a) there was no proper evidence before the Provincial Court judge from which he could conclude that the child was of an age and degree of maturity to object to his return to Israel, and (b) the judge erred in weighing the child's objection and in making it the sole or predominant factor in declining to order the return of the child.

[15] The respondents submit that there was evidence before the judge supporting his finding that the child had attained an age and degree of maturity such that it was proper to take the objection into account. In addition, the judge's weighing of that evidence, in exercising his discretion, is entitled to deference.

VI. Analysis

[16] Counsel for the child acknowledges that the issue in this case is not what is in the best interests of the child. That is an issue the Contracting States have agreed is best left to be determined by the country in which the child was habitually resident before removed. The issue, instead, is whether the conditions for return under the *Hague Convention* have been met. On this subject the Provincial Court judge found both that the failure of the father to return the child was wrongful and that the child faced no grave risk if returned to his mother in East Jerusalem. No issue is taken by either party with respect to these findings. The issues remaining, therefore, are whether the child was sufficiently mature to express his views on where he ought to live, and, if so, what weight to give to those views. In short, should the child's stated objection be permitted to trump all other considerations?

A. The Convention

[17] The objects of the Convention are found in Article 1 and are easily stated. They are to bring about a prompt return of children, wrongfully taken or detained, and to ensure that the rights of custody and access under the laws of each Contracting State are respected. The underlying premise is that the state in which the child is habitually resident is the appropriate place to decide issues of custody and access.

[18] This Court has discussed the interplay between these objects and the exception found in Article 13 of the Convention being invoked in this case. In *Den Ouden v Laframboise*, 2006 ABCA 403, 417 AR 179, this Court dismissed an appeal from an order requiring the return of three children, ages 14, 10 and 5, to Holland where they had been habitually resident before the mother removed them to Canada. One ground of appeal was that the two older children objected to returning to Holland. The court accepted that the children enjoyed their current environment, including their new school and new friends, and did not wish to have their lives disrupted by having to return to Holland (para 15). Nonetheless, the court stated, at para 16:

> These feelings are completely understandable and not unexpected. The mother has continued to devote herself to their care and has provided well for her children. However, to exercise the court's discretion permitted by Article 13, and give effect to feelings of children who find themselves in such situations would undercut the fundamental objective of the Hague Convention. That would lead other parents to believe that they may abduct their children, go to another country, settle there, and then rely on their children's contentment to avoid being returned to the jurisdiction which should properly deal with their custody and residence. We cannot encourage such conduct.

B. Evidence before the judge hearing the application

[19] The application proceeded on the basis of affidavits deposed to by each of the father and mother. The affidavits did not address, at least in any direct fashion, the maturity of the child. The father deposed that when the child arrived in Calgary (the child then being 9 years of age) he told him that "he wanted to stay in Canada and was scared to go back to Israel". No cross-examinations on the affidavits were conducted.

[20] Both the father and mother were represented by counsel at the application. The child was also represented by counsel pursuant to an order made in the Provincial Court on February 21, 2012. The preamble of that order states, amongst other things, that "this matter is a high conflict situation" and that "the court has determined that the child, [NS], requires legal counsel in order to represent the best interests of the child". The order appoints a lawyer "to represent the interests of the child".

[21] At the application, the child's counsel made submissions on the issue of the child's maturity, and the nature of his view on where he should live. The court was advised that the child's counsel and his articling student had met with the child on two occasions and at the second meeting had asked him a number of questions prepared by a well-respected child psychologist in Calgary. The questions proposed by the psychologist were ultimately entered as an exhibit in the proceedings. Counsel advised that they had been prepared with a view to assessing the child's maturity.

[22] Counsel for the child essentially explained what was done during the interviews and advised the court that they (both counsel and the articling student) believed that the child possessed a sufficient degree of maturity that his views should be taken into account (ARD, F71/13-29). Counsel informed the court that the child's objections "were clear right from the get go." Describing those views, counsel stated that the child felt the conditions in Israel were not safe, and that he did not want to go back. The court was told, "He said that very clearly and not even once, during the two meeting, did he retract from any statements he made. His objections were clear and he stood by them" (ABD, F70/1-4).

[23] The child's counsel reported that they had considered whether the boy had been influenced by his parents in coming to his decision. The court was informed, "his views did seem pretty

independent, he was pretty sincere in what he said and we did not feel there was any influence at all from either of his parents" (ARD, F74/25-27).

[24] In our view, these submissions did not provide a proper evidentiary basis for the court to assess the maturity of the child, nor to assess his views if he was sufficiently mature to have them considered. In saying so, we make no criticism of counsel for the child whose duty it was to represent him. We accept that counsel (including the articling student) had satisfied themselves that the child was of sufficient maturity to instruct counsel, and that his desire to remain in Canada was faithfully communicated to the court. The issue before the court, however, was first whether the child had attained an age and degree of maturity such that it was appropriate to take his objection into account, and, second, if he was sufficiently mature, what weight should be given to his views. On these issues, the submissions of the lawyers did not amount to useful evidence.

[25] There are several reasons for this. The first is related to the complexity of the enquiry. Determining the level of maturity of a child, particularly one who had recently turned 10 years old, is a difficult matter calling for some expertise. The task was described by Glenn J. in *MLE v JCE (No 2)*, 2005 ONCJ 89, at paras. 12-13:

> It would seem to me that, if one were to even consider the views of a child who was as young as age ten in the context of an Article 13 argument, the level of maturity would have to be quite extraordinary. The court might look at some of the following earmarks of maturity, such as:
>
> 1. whether this child had made good decisions of a substantial nature for herself in other situations;
>
> 2. whether she had the ability and opportunity to, and in fact had reasonably weighed the more important competing benefits and disadvantages in reaching her decision;
>
> 3. whether her decision was reached with a reasonable measure of independence;
>
> 4. whether her fears relating to returning to the home state appear reasonable, in the circumstances—in particular in this case:
>
> (a) whether she had considered and understood that, even if the court acted on her wishes and allowed her to stay in Canada, her two younger sisters might have to return to England and leave her behind;
>
> (b) whether she had considered not only the scenario of living with her mother if she were to return to England, but also, the alternative of living

> with her father if she were to return to England pursuant to any order of this court; and
>
> (c) whether she had a reasonable appreciation of the potential consequences of her decision, should the court act on her views, especially in regards to her future relationship with her mother.

These are tall orders for a young child. The stronger the evidence that a child had touched some of these bases, the greater would be the court's comfort level in relying on this young child's views. Most ten-year-old children are never put in the position of having to demonstrate this level of maturity. In fact, one would never expect parents to place their child in a position of having to live with the consequences of making important "life" decisions using their as-yet undeveloped judgment. As children reach their teen years, assumptions can more readily be made about their maturity since they more regularly have opportunities to make important decisions for themselves on matters that younger children should never have to contemplate.

[26] In this case, counsel, though well versed in the law, did not demonstrate that they possessed any specialized expertise in understanding and analysing the thoughts of young children. The experience they brought to the task of assessing the child's maturity came from their general experiences in life, and, while this was no doubt useful, it was not enough to assure a trier of fact of the utility of their opinion on the subject of the child's maturity. This was not a case where non-expert opinion evidence, as described by the Supreme Court in *R. v. Graat*, [1982] 2 S.C.R. 819, was of use to the court. The court needed the opinion of a qualified expert. As family lawyers, Alfred A. Mamo and Joanna E.R. Harris, state in their chapter, "Children's Evidence", published in *Evidence in Family Law*, edited by Harold Niman and Anita Volikis, July 2010 Canada Law Book, at 4-29:

> Evidence about the child's wishes and views should be put before the court by a social worker or other child care professional, who has interviewed the child. The professional person can testify about exactly what was said by the child, describe the circumstances in which this information was communicated, explain its context, and offer an opinion about the relationship of the child's views to the child's interests. The clinician giving such evidence can then be cross-examined by all of the parties, ensuring that this evidence is fully explored and fairly tested. (citing *Catholic Children's Aid Society of Toronto v S.R.M.*, [2006] OJ No 1741 at para 111).

[27] Furthermore, an opinion, whether expert or not, is no better than the facts supporting it, and in this case there was little, if any, evidence before the Provincial Court judge, other than the list of questions prepared by the psychologist, to support the opinion being offered by counsel.

[28] The second difficulty with counsels' evidence on maturity was that it was presented through submission. Ordinarily, counsel cannot give evidence without forsaking his or her position as counsel because the inability to cross-examine on the evidence is a source of considerable prejudice to the other side. In *Strobridge v Strobridge* (1994), 115 DLR (4th) 489, 18 OR (3d) 753 (ONCA), Osborne J.A. concluded that counsel for the children could not state the children's views and preferences, nor express an opinion on any issue, without the express consent of the other side. He commented at paras 35-36:

> It seems to me that, absent consent, counsel cannot be both an advocate and a witness on an important issue. That proposition was clearly stated in *Cairns v. Cairns*, [1931] 3 WWR 335 (Alta. C.A.), at p. 345, in this way:
>
> > It is to be borne in mind that the function of counsel in any Court is that of an advocate; he is there to plead his client's cause upon the record before the Court and he does not in any sense occupy the dual position of advocate and witness.
>
> Counsel retained by the Official Guardian is entitled to file or call evidence and make submissions on all of the evidence. In my view, counsel is not entitled to express his or her personal opinion on any issue, including the children's best interests. Nor is counsel entitled to become a witness and advise the court what the children's access-related preference are. If those preferences should be before the court, resort must be had to the appropriate evidentiary means. See Carol Mahood Huddart and Jeanne Charlotte Ensminger, "Hearing the Voice of Children" (1992) 8 C.F.L.Q. 95. The Official Guardian, through counsel, will see that evidence going to the issue of the children's best interests is before the courts.

[29] In this case, there is no evidence that formal consent to the process of bringing the evidence forward by way of submission was sought either prior to, or even at, the hearing. While no express objection appears to have been taken to the submissions made by the child's counsel, a failure to object is not the same thing as drawing the issue to the attention of the court and other parties, and securing their considered consent. In any event, as earlier noted, even if the submissions were received as evidence, such submissions do not disclose the methodology and basis upon which the opinions of counsel were based, nor do they demonstrate an expertise qualified by the court to offer such opinions as reliable and probative in nature.

[30] A third problem relates to the Court's inability in these circumstances to evaluate the basis upon which the child's seeming opinion about his preference for staying in Canada rested. As with any other opinion or conclusion by a person, the child's perspective should be weighed not only in light of the apparent maturity of the child but also upon what the child actually knows or understands about the alternatives and also upon what other factors may have influenced the child's thinking. Again this is a matter which an expert would look into and report upon for the Court. Without suggesting any improper influences, the record suggests, and the father's submissions at the hearing of the appeal confirmed, that he provided his child with some

characterization of his options. It was, in our respectful view, simply not possible on what was provided to evaluate the effective source of the child's position.

[31] The fourth difficulty relates to the way in which the Provincial Court judge actually weighed the evidence of the child's views. As Glenn J. remarked in *MLE* at paras 6-7:

> It is important to note that it is not ever just a question of sufficient age or of maturity for that matter, but it is a combination of both factors that must be present before a court could rely on the views of a child to prevent his or her return to the home state. *Further, even if the court determines that a child has achieved the requisite age and maturity, his or her wishes do not represent an automatic veto on the question of the return to his or her home state*.
>
> The Hague convention applies to children up to the age of 16 years. Clearly, the closer a child might be to age 16, the more a court might be influenced by his or her views. But even a 16-year-old might not have the requisite maturity to trigger the provisions of this section. At the other end of the scale, very young children would likely never be able to express views that would prevent their return to their home state.
>
> (emphasis added)

[32] It is clear from these authorities that a number of factors go in to the exercise of discretion under Article 13 of the *Hague Convention*, and that an objection does not result, automatically, in a decision to reject the application. In this case, the Provincial Court judge did not explain how he weighed the objections of the then 10-year-old child and why he gave them effect. He seemed to treat the child's objection as controlling. While he found that he child's objection was not coerced, nor otherwise improperly influenced, the evidence and matters he took into account in coming to that conclusion were also missing from his decision. There is also the concern that, in weighing the elements of the child's objection which spoke to the child's preferences and hopes, the Provincial Court judge fell into forming a conclusion about the child's best interests. The policy of the Convention is that the courts of signatory nations are credited with the ability to address best interests appropriately. In short, the objects and policy considerations underlying the Convention appear to have been overridden without a proper evidentiary basis and upon an incorrect assessment of the tests contained in Article 13 of the Convention that may authorize a domestic court to exempt a child's case from the direction contained in Article 12.

[33] In *Re M*, [2007] UKHL 55, [2008] 1 All ER 1157, the House of Lords dealt with the *Hague Convention* in the context of a "settlement" situation in which there was no duty under Article 12 to return the children. However, the comments of Baroness Hale on situations in which a child objects are apposite. She stated, at para 46:

> In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only

> two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. *Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier.* The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.
>
> (emphasis added)

[34] It is clear from these authorities that a number of factors go in to the exercise of discretion under Article 13 of the *Hague Convention*, and that an objection does not result, automatically, in a decision to reject the application. In this case, the Provincial Court judge did not explain how he weighed the objections of the then 10-year-old child and why he gave them effect. He seemed to treat the child's objection as controlling. While he found that he child's objection was not coerced, nor otherwise improperly influenced, the evidence and matters he took into account in coming to that conclusion were also missing from his decision. In short, the objects and policy considerations underlying the *Hague Convention* appear to have been overridden, without a proper evidentiary basis.

VII. Conclusion

[35] It is trite law that deference should ordinarily be given by an appellate court to the exercise of discretion by a judge making an order in the first instance. Here the Queen's Bench judge characterized the father's wrongful detention of the child as "egregious" (para 18), but she considered that deference was owed to the decision of the Provincial Court judge declining to order the child's return to the custody of his mother.

[36] Deference is not owed, however, to a decision reached through error in law or principle, or which is unreasonable. In our view, there was no useful evidence before the Provincial Court judge to support the position that the child had "attained an age and degree of maturity at which it" was "appropriate to take account of its views." Thus, the findings made by the judge without a proper evidentiary basis constituted an error of law. Furthermore, even if there was sufficient evidence before the court to allow the judge to consider the child's s views, it was unreasonable to treat the

child's objections as controlling, and giving them inordinate weight in the particular circumstances of this case, thereby defeating the objects and purpose of the Convention.

[37] The Queen's Bench judge remarked that "this is a most difficult case". That it is, in the sense that a boy's future life and the opportunities which this country presently provides him are at stake. However, the finding of the Provincial Court judge, based, at least in part, upon the affidavit evidence before him, was that the child was not facing grave risk, in the nature contemplated by the Convention, should he return to Israel. Moreover, the child is not condemned to living outside of Canada should he ultimately make a mature judgment to return to this country which has granted him citizenship. Prior to that, the father can initiate custody proceedings in Israel, if he wishes, and, in any event, the Convention will no longer apply when the child reaches 16 years of age. Even before attaining that age, effect may well be given to his choice of residence if he demonstrates a sufficient degree of maturity.

[38] We are mindful that the child is now nearing 12 years of age. The process has already taken far longer to resolve the issue than contemplated by the Convention. In our view, the proper remedy is to make now the order which should have been made much earlier.

[39] The appeal is allowed and an order is made that the child be returned to his mother in East Jerusalem, "forthwith", as prescribed by the Convention.

Appeal heard on December 6, 2013

Memorandum filed at Calgary, Alberta
this 18th day of December, 2013

O'Brien J.A.

Authorized to sign for: Watson J.A.

Authorized to sign for: Macleod J.

Appearances:

F. Gordon
for the Appellant

Respondent Jihad Sarhan, In Person

M. Blitt
for the Respondent Child