

**REJB 1998-10493 - Texte intégral**

CITATION: P. (N.) v. P. (A.)

**COUR SUPERIEURE** (Chambre de la famille)

CANADA  
PROVINCE DE QUÉBEC  
DISTRICT DE HULL  
NO : 550-04-003487-986

DATE : 1998-11-12

EN PRÉSENCE DE :

JOHANNE TRUDEL , J.C.S.

**P. (N.)**

**Applicant**

**v.**

**P. (A.)**

**Respondent**

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**Trudel J.C.S.:-**

**Preamble**

1 The Applicant testified in English, the Respondent in Russian. Mr Nicholas Fernandez interpreted from Russian to English and from Russian to French. Therefore, this judgement is delivered in English. Before being filed and outside the presence of the parties, the judgement is also read by the undersigned, using the official court tape recording system. Mr Fernandez interprets the judgement in Russian for the benefit of Mrs B. The official tape will be filed on record in a few days.

**The evidence**

**a) Mrs B.**

2

1. While domiciled in Byelorussia, B. replies to an add in a newspaper seeking a job in a restaurant in Israel.
2. Following a phone conversation, she meets a person in Minsk who confirms that she will work as a waitress in a restaurant. The anticipated salary is \$1,000 per month. This same person obtains her visa and pays for the plane fare to Tel Aviv.
3. Upon her arrival at Tel Aviv's airport, on 17 October 1992, accompanied by another young woman (V.), she meets a certain W. she is still under the impression that she is to work in a restaurant.
4. This is her first voyage abroad. She does not speak Hebrew. She communicates with W. in Russian.

5. She accompanies W. in an automobile and he immediately demands her passport. They drive to his home. W.'s wife (M. ) is in the apartment.
6. Upon her arrival at W.'s home, Mrs B. and her travelling companion wish to ask questions, particularly since their passports have been taken from them. W. suggests they go to a room and rest.
7. The Respondent then witnesses an argument between W. and his wife. She cannot understand what they are saying since they are speaking Hebrew. When W. strikes his wife, the two young ladies hide in another room.
8. The next day, W. drives his two guests to see J., the owner of the restaurant where they are to work, forewarning them to "behave" if they want to get the job.
9. The respondent states that several persons are in the apartment in question and that liquor is everywhere. The Respondent has sex with J. She is not forced to do so but the idea is presented as "a good suggestion".
10. The Respondent states that she was sold to a member of the Russian Mafia. He in turn sells her to the Applicant, Mr P.
11. The evidence is overwhelming that as soon as she sets foot in Israel, the Respondent is forced into a prostitution ring.
12. She is without her passport. Her movements are restrained. She states that she is locked in an apartment with other prostitutes. A Russian man is in control of the whole operation. Everything the young ladies need is bought for them.
13. In December 1992, the Respondent meets Mr P. in Netaya at the Hotel Aurika. This is when Mr P. purchases her for \$4,000 (US). The latter then takes possession of the Respondent's passport.
14. Henceforth, she lives in Mr P.'s apartment in Mirmoret. Two other girls also spend their days in Mr P.'s apartment. The Respondent does not complain considering the treatment accorded to the other two young women. She states "He did not beat me".
15. From then on, the Respondent becomes the employee of the Applicant who manages an escort service known as "Unique Escort Service".
16. Clients reach the Applicant on his cellular telephone and place their order. When a Russian woman is called for Mr P. drives the Respondent to the hotel or directly to the client's home. She is picked-up after the engagement. The Respondent then turns over 75% of the proceeds to the Applicant.
17. The Respondent realizes that her services are very profitable to the Applicant. He makes her work 24 hours per day. "A good day" she says can bring up to twenty clients.
18. At the end of the day, the Respondent must also satisfy the Applicant's sexual needs without charge, while he reminds her that he is her last client.
19. The Respondent relives the same situation she experienced with her prior bosses who had the same expectations of her.
20. With Mr P., the Respondent is not always free to come and go. She cannot leave the house alone. She states "After all that I had seen, I was afraid".
21. In April 1993, the Applicant moves to a two-bedroom apartment in Herzliya, to better serve the increasing needs of his business. Along the way, the Respondent states, Mr P. purchased another Russian girl (N.). The first bedroom there is shared by Mr P. and Mrs B.; the other by the chauffeur and N.
22. There is no doubt in the Respondent's mind that she is forced by the Applicant to prostitute herself. She testifies that the Applicant tells her "I paid \$4,000 for you and you must work for me".
23. The Respondent testifies also that she demanded her passport from the Applicant as soon as he became her boss. She wants to return to her country to join her mother. The Applicant

repeats to her that she has to work for him but he then starts to share the proceeds of her work equally with her.

24. The Applicant is the one who proposes the marriage, claiming to love the Respondent. She does not believe him but can see no other avenue. She states “He told me that I could stop working and I could regain my passport”.

25. The formalities of the marriage are executed around the 13<sup>th</sup> of May 1993, in the office of a lawyer retained by the Applicant. The respondent must pay \$500 of the \$1,000 required fee.

26. This same lawyer, Mr Arthur Rosenstein, assists the Applicant when he signs the detailed affidavit in support of the matter before this Court.

27. The documents signed by the Respondent in connection with the marriage are drafted in Hebrew and in Paraguayan. Mr Rosenstein, the lawyer, translates them into Russian for the benefit of the Respondent.

28. The Respondent explains that she enters into this marriage in the hope of recovering her passport. When this does not happen, she flees for the first time, after covertly recovering her passport from its locked location, using the Applicant's keys, which he accidentally forgets in the apartment. The Respondent leaves with her savings and takes refuge in a Tel-Aviv hotel. She does prostitution there, explaining that she has no choice: “I was stuck there”. She is soon traced by the Applicant who shows up with three individuals: an Israeli pimp; a Russian who engages in the traffic of persons to Israel and a third man who has girls working for him also. The Respondent knows these men, having seen them before. This first flight takes place some two weeks after the marriage.

29. The Respondent relates as follows the sequel to her escape: “Mr [P.] had a very bad reaction. he thought I had stolen his money. He tries to convince me to return with him, failing which he will file a police complaint against me to the effect that I am his wife and stole his money and I would go to prison”. She continues: “They took me forcibly and brought me back. There he locked me up in the apartment. He took my passport. He beat me and raped me”.

30. At the Applicant behest, the Respondent resumes her prostitution activities when the Applicant loses one of his escorts. The Applicant reminds her that she is his wife and must assist him financially. After the marriage, the Applicant pockets all her earnings.

31. The Respondent explains that she wants to be a model. She has plastic surgery on her nose and goes to modeling school, but the Applicant forbids her to engage in that work and brings her back to prostitution.

32. Also in 1993, the Respondent attends the New Immigrant School in Israel. The Applicant drives her back and forth, leaving her no freedom.

33. In December 1993, the couple visits the Respondent's mother in Byelorussia, where, the Respondent states, the Applicant seeks her help in finding other girls who would work for him in Israel.

34. The Respondent adds that the Applicant threatens to inform her mother of everything if she does not behave as he wishes. According to Mrs B., Mr P. has contacts in Byelorussia who can help him import girls directly into Israel.

35. The couple returns to Israel with one girl (L.) recruited in Byelorussia. The Respondent does not want to return. She does so under the threats of the Applicant and other Russian men that her mother will have problems if she does not return to Israel. She even pretends to have lost her passport but the Applicant produces a false one, which he obtained for \$100.

36. The couple settles in a three-bedroom apartment together with L.

37. The Respondent still does not have access to her passport. She refuses to work because she is pregnant. She does not reveal her condition to the Applicant.

38. In July 1994, the Respondent travels to Byelorussia on behalf of the Applicant who seeks another girl for his work. The respondent is six months pregnant by this time but the Applicant is not aware of it. The baby is born on *September 22, 1994*.

39. The Respondent then states that the Applicant arrives in Byelorussia one week after the birth of the baby. Mrs B. is terrified and knows not how to announce the child. She says: "I was afraid for my child because I know him. I did not know how to announce the birth. I did not know where to hide with a baby only one week old. I presented him the baby and he asked what is this? Itell him it's a baby. He asks whose is it and I tell him mine. I could not tell him to leave because I was terrified of him. I tell him he can go if he does not believe the baby is his".

40. The Applicant settles in with the Respondent and the baby in the mother's home. According to the Respondent, the Applicant ignores the baby and even faults her for breast-feeding him; his concern is that it could affect her figure. between March and June 1995, the Applicant travels alone. One of his destinations is the United States for a period of three consecutive months.

41. Finally, the couple and the baby leave for Israel in *June 1995*. The Respondent says she sees no alternative. The baby has an Israeli passport and the Applicant promises her he will quit the prostitution business. On this return voyage, the parties are joined by S., a cousin of the Respondent. Mr P. has invited her to work with his agency.

42. The first leg of their Journey takes them to Cyprus. There, S. cannot secure the necessary visa. She returns to Byelorussia at the Applicant's expense but she later rejoins them in Israel on the 19<sup>th</sup> of July, 1995. S. testifies before this court and her testimony will be mentioned later.

43. The delays attempting to obtain S.'s visa result in a one week stay in a Cyprus hotel. When S. leaves, the parties and the baby board a ship bound for Israel. On arrival, the Applicant is arrested by the Israeli police. The Respondent is left alone and without money. A friend takes her to a hotel for a few days during which she is without news from Mr P.

44. Then Mr P. surfaces. The Respondent is worried for their future. Mr P. tells her "Don't worry, we will recruit two or three girls and we will have money".

45. The family relocates in another hotel for the next month. The Respondent is often alone with the child. The Applicant is constantly out on business.

46. At the end of this month, the family changes hotels, this time to the Hotel Maxime. The Respondent thinks that a girl shared their room while two other girls who worked for the Applicant shared another room.

47. The Respondent then locates an apartment in Gathmanes. According to Mrs B., the Applicant employs three girls at that time.

48. The new apartment has only one bedroom with two beds. Everyone sleeps there. There is no prostitution in the apartment but the cellular telephones ring day and night. In short, the Applicant directs his operation from there.

49. In January 1996, another move occurs. The Applicant acquires an apartment on Gordon Street (the Applicant's current residence). The Applicant's business flourishes. Girls wait there more and more for the calls of clients.

50. In vain, the Respondent pleads with the Applicant not to run his operations from the home. She states: "He threatens to take me to Court and ask for custody of the baby saying no one will believe me because I engaged in prostitution in Israel. (...) You will never see your baby if you go to the police. I will kill you".

51. In 1996, the Respondent then starts to work as a waitress in a café. The Applicant faults her for this. "He constantly asked me why I wanted to work. It was clear the situation would never change and I had no money. Mr P. never gave me any". Although the Respondent could then come and go freely with the child, the Applicant insisted that she carry a cellular

phone or pager. He would contact her every fifteen minutes to know where she was. While the Respondent works at that job, the child attends a day-care centre.

52. She meets H. in the Spring of 1996. With her, in August 1996, she flees to Canada with her child. They now live intimately together.

53. The Respondent leaves Israel for Byelorussia, on *August 6, 1996*. The Applicant asks her to go home to recover her driver's licence. New immigrants to Israel may buy a car without taxes. The plan to come to Canada is already in place. The Respondent adds that the Applicant calls her and threatens her constantly. "I could not go anywhere because he could find me."

54. The Respondent and the child arrive in Canada on *August 19, 1996* along with Mrs H. who visits a friend in Brockville, Ontario. They rent their apartment in Gatineau (Québec) in October 1996.

55. To survive and to meet the child's increasing needs with the coming winter, the Respondent works for an escort service for a period of approximately three weeks. She then qualifies for social aid (28 October 1996, I-1) and still receives financial assistance (750\$ per month). When confronted with her decision to go back to prostitution by the Applicant's attorney, the Respondent answers: "For me, it is better to go back to this work than to go back to this man".

56. The Respondent also works as a strip-teaser, twice per month for a period of seven months. She earns approximately 200\$ per month, the maximum amount allowed by law to continue receiving financial aid without any adjustments. She needs the money to enroll the child in day-care where she pays 25\$ per day because of her status in Canada. She stops when the Immigration Authorities inform her that her social security number is not a working visa.

57. When the Respondent goes to work, H. cares for the child. The Respondent only works to earn the extra money needed for the child.

58. She has no intention of persisting in that line of work. She even finds a job at Howard Johnson as a maid. She works for one month but leaves when she learns of Mr P.'s arrival in Canada, afraid something bad will happen.

59. The child did not enjoy the day-care centre. Since last September, he is now a pre-schooler at a private Jewish school located in Ottawa. The Respondent pays 200\$ per month to allow her child to attend that school.

**b) S.**

3

60. S. travels from Byelorussia to testify at the hearing. The Respondent's mother pays for her airfare. She doubts the Applicant expected her presence in Court.

61. S. confirms that she follows the family from Byelcrussia to Cyprus in June 1995. The Applicant is unable to arrange for her Visa from there. So she goes back and joins the P. on 19 July 1995. She stays in a hotel with the Respondent and the child. From then on, she moves to a second hotel with the family. She starts working for Mr P. as soon as they reach that second hotel. Her working conditions are as described by the Respondent: Mr P. receives the phone calls and drives her back and forth. According to the witness, the Applicant's instructions are simple: "Go in for one hour, take the money, have sex and leave". She gave 80% of her earnings to the Applicant.

62. She must work for Mr P. for a set period. If she decides to leave the business, she must reimburse him for her airfare.

63. S. moves with the family in Gathmanes. She confirms that Mr P. conducts his business from the house. He carries his two cellular phones, which ring around the clock.

64. The witness also states that the Respondent argued constantly with the Applicant about the phones ringing all the time and disturbing the baby's sleep, but to no avail. Mr P. would

turn the phones off around 3 or 4 o'clock in the morning, when he arrived with his employees.

65. S. denies being thrown out of the house by the Applicant. She left in November 1995 because she met a man with whom she wanted to live. She then worked as a waitress in a Russian restaurant located in Tel-Aviv. The Applicant retains her passport to ensure the fulfillment of her contract with him. She finally gets it back through her cousin A.

66. After her departure, the witness sees Mr P. who informs her that her cousin has disappeared. He invites her to his place and she goes: "He called me and I did not want to have him as an enemy in Israel. He has a very strong sense of security in Israel and he says he can do anything in Israel. I know he has many Russian acquaintances. He spoke to them often".

67. The witness goes back home 1 December 1996. She states that the Applicant calls her often in Byelorussia to enquire if she knows where A. is. He tells her that he will have A. and her mother killed by his Russian friends if he does not find his son.

68. The witness mentions that the Applicant, this year, invited her to travel to Israel with a false passport to work for him as a prostitute. In 1998, he called her regularly while he travelled to Minsk. The witness refused the offer. She works at the post office in her village.

69. Finally, S. states that the Applicant frightens her. She is also afraid for the Respondent's mother.

**c) K.**

4

70. Mr K. is the social worker in charge of the Respondent's file for the Director of Youth Protection. A trained criminologist from the University of Ottawa, he works for the Director of Youth Protection since February 1989.

71. He intervenes in the file on 27 February 1998 at the request of the Director. A motion is then presentable in March and he must ensure that the child will remain in Quebec throughout the duration of the hearing. He is authorized to put in place any appropriate measures to fulfil his mandate.

72. Mr K. meets with Mrs B. and the child, on 3 March 1998. The police and a Russian interpreter accompany him.

73. He explains the purpose of his visit. Immediately, he notices the terror in Mrs B.'s behaviour. She insists on knowing whether or not Mr P. has her address.

74. This first meeting lasts for 3 hours. Everything Mr K. then hears from the Respondent as to her past life is compatible to what is said during the hearing.

75. At the end of the meeting, the mother accepts Mr K.'s suggestion to place the child in a foster home. Because of the child's reaction, Mr K. allows the mother to accompany him. The mother is also allowed to stay with the child until he falls asleep. Then, Mrs B. takes refuge in a shelter, afraid that Mr P. will locate her apartment.

76. The next day, the foster parent calls Mr K. to report on the child. The night was so difficult for the young boy that it is decided to allow Mrs B. to live with the foster family until a better solution can be found.

77. Mother and son stay in the foster family for two days. Then, they both move together to the shelter. When Mr P. departs, at the end of March 1998, Mrs B. voluntarily signs provisional measures with the Director of Youth Protection and remits her travelling documents. Those measures are still in place and will remain until this judgement is rendered.

78. Before departing, the Applicant, through Mr K., makes a proposal to the Respondent: he will withdraw his charges against her and will pay for her expenses if she comes back. He will ask for joint custody.

79. Mr K. closes his file at the end of May 1998 and reopens it in October, in view of the present amended motion.

80. Once again, Mr K. ensures that the child will stay in Quebec for the duration of the proceedings. Once again, he notices how Mrs B. is afraid for her son and for herself. She tells Mr K. about the relationship between the Applicant and the Russian Mafia.

81. Mr K. takes time to verify the Respondent's story and the allegations of the Applicant, e.g. that criminal charges have been laid against the mother in Canada for prostitution activities (paragraphs 27 and 28 of Mr P.'s affidavit). His search through the police and the Centre for police Information is negative.

82. Mr P. also alleges that Mrs B. and H. have entered Canada illegally. Verifications with Immigration Canada and Immigration Quebec confirm that Mr P. is wrong. He is also informed that Mr P. was refused entry to Canada in 1989 as a «visiteur de mauvaise foi». No one from Immigration Canada is heard to confirm the veracity of this conversation.

83. No file was ever opened under the Youth Protection Act. The child's welfare was never compromised. The Respondent's apartment is clean and adequate. The child is happy and well adjusted.

84. Finally, Mr K. witnesses two supervised visits held between father and son. According to him, the interaction is poor, at best.

85. Mr K.'s report is filed under I-6.

**d) Mrs R.**

5

86. Mrs R. is the child's teacher since last September. She describes the child as being happy and socially inclined. He shows no aggression towards his peers and has many friends. He works meticulously and is well behaved. He comes to school dressed appropriately for the season, and always with a big lunch.

87. The teacher notices the strong bond between mother and child. She once organised a party at her house where she invited her students and their parents. She was impressed by the relationship between the mother and her son. Rather than interacting with the other adults, Mrs B. spent time with her son when he needed it. She also noted that Mrs B. volunteers for school activities. Mrs R. concludes that the child is well integrated to his new environment.

**e) Mr P.**

6

88. Mr P. is thirty-six years old and lives in Israel. Before testifying in front of this Court, he signs two affidavits. Both are filed on record (I-10; I-2).

89. The first one, dated 25 July 1997, accompanies his request for a divorce in front of the Municipal Court in Mozyr. Referring to the Respondent, he states: "Ma conjointe faisait de la prostitution avant en Israël, mais je suis tombé en amour avec elle, je lui ai pardonné tous ses péchés et j'espérais que mon amour et mon attention suffiraient pour la remettre sur la bonne voie et qu'elle deviendrait une bonne mère. Mais elle n'appréciait pas mon amour et mon attention, et je crois qu'elle a recommencé à faire de la prostitution. Dans de telles circonstances, elle ne peut pas donner une éducation digne à notre fils et c'est pour cela que je considère qu'il faut me transférer la garde de mon fils».

90. The second one, dated February 11, 1998, is prepared to support the request of the Israeli Government for the return of the child.

91. The Applicant declares that the Respondent, until he met her, worked as a prostitute for the Russian Mafia. He released her for the amount of \$6,000 for the purpose of marrying her and creating with her a family (Par. 3).

92. Then, the Applicant proceeds to discuss his marriage to the Respondent and their return to Israel after the birth of their son. He confirms that S. accompanies them to Netaya.

According to him, it is at the request of his wife that her cousin lives with them in their rented apartment.

93. To that effect, he adds “Very quickly, I learned that this relative works as a prostitute and I threw her out of the house”. (Par. 10) At the hearing, the Applicant corrects himself alleging he threw S. out of the house because she drank and made Mrs B., drink too.

94. He also adds that following that decision, his wife asked for a divorce. He consented as long as he would retain custody of the child. He states “I was convinced that the welfare of the child demands that he remain with me in light of my wife's past and the fear that she would return to supporting herself through prostitution”.

95. In paragraph 32, the Applicant mentions that “A. hurt R. severely when she took him out of his home, away from me and ran from place to place until returning to prostitution while I, through great difficulty, succeeded in taking her out of this”.

96. The Applicant submits that he cared for the child, getting up at night while the mother took concern for herself only. No where does he mention that the Respondent breast-fed the baby for 6 months. In a photo album filed by the Applicant, a picture dated 11 January 1995, shows the Respondent breast-feeding her child.

97. Cross-examined on these allegations, the Applicant states that prior to “releasing” the Respondent from the Russian mob, he had no prior contact with the Russian Mafia. He admits that she worked for his agency. He had between one and ten girls at a time.

98. The Applicant also admits running the “Unique Escort Service”. Asked if he invites prostitutes to his house to wait for calls, he answers “You call it prostitutes. I only arrange meetings between people. What they do, I do not know. They are not prostitutes and I am not a pimp. (...) What they do is none of my business”. He does admit that he made a lot of money.

99. The Applicant also admits that some of the girls who worked for him had “bosses”. Someone would come to his office, usually a coffee shop (Montana Café), and offer a girl he could look at. The boss would ask for a certain percentage and he would or not accept the proposal.

100. The Applicant claims to have ceased that business two years ago. Now, although he still owns the business, someone else runs it. He rents his cellular phone and his phone number to a “Misha” for \$100 cash per day. If he chooses to, he may go back to his business.

### **The Law applicable to this case**

7 The Applicant asks this Court to order the immediate return of his son to the State of Israel. He, originally, introduces his motion in March 1998. For reasons that remain unexplained, he does not proceed on his motion and introduces an amended motion, in October 1998. The Court proceeds on this second motion introduced under Section 18 of *An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction*<sup>1</sup> [hereinafter the Act].

8 By this Act, the Province of Quebec subscribes to the principles and rules set forth in the *Convention on the Civil Aspects of International Child Abduction*<sup>2</sup> [hereinafter the Convention] signed at The Hague on 25 October 1980. The Convention aims to protect children internationally from the harmful effects of their wrongful removal or retention.

9 The illicit character of the child's removal is not challenged in the present case. It is admitted that the parties were married in Israel. It is further admitted that the child is an Israeli citizen and that under Israeli Law, both parents, during the marriage, exercise joint custody of the child. The removal of the child was wrongful.

10 Since the aim of the Convention is the return of abducted children to their place of habitual residence, any defence raised against this fundamental principle must be interpreted restrictively. The Respondent raises grounds of law and facts to prevent the return of the child. She invokes sections 20, 21 and 22 of the Act (s. 13b of the Convention).



11 The duty to return the child is not abrogated by a finding under s. 13(b) but merely changes the duty from mandatory to discretionary. Since the general intent, as mentioned previously, is to cause the return of a child to his or her “habitual residence” unless there are very compelling reasons otherwise, the court of the requested country should normally exercise its discretion and return the child.

12 The Respondent who requests that the court exercise its very limited discretion to use this narrow exception has the burden of establishing the existence of both the “grave risk” and the “intolerable situation” by clear and convincing evidence.

13 In the present case, the proceedings were commenced after the expiration of a period of one year since the wrongful removal. Section 20 of the Act provides that even then, the Court “shall also order the return of the child, unless it is demonstrated that the child is now settled in his or her new environment”. The burden of proving the integration of the child to a new environment also rests on the Respondent.

#### **The grave risk and the intolerable situation**

14 In *Thompson v. Thompson* <sup>3</sup>, the Supreme Court of Canada rejects the notion that wresting the child from its primary caretaker is an acceptable by-product of the initial abduction:

As this Court stated in *Young v. Young* [1993] 4 S.C.R. 3, from a child centered perspective, harm is harm. If the harm were severe enough to meet the stringent test of the Convention, it would be irrelevant from whence it came. I should observe, however, that it would only be in the rarest of cases that the effects of settling in to the abductor's environment would constitute the level of harm contemplated by the Convention.

A “grave risk” defence should be based upon serious and convincing evidence. In the present case, the primary caretaker, the Respondent, carried out the abduction. She raises the interruption in bonding as a potential defence to the return of the child. She is afraid to go back to Israel.

15 While an interruption in bonding can be a real and significant problem, its outset is found in the actions of the abductor. On the other hand, the abduction also prevents the left-behind parent from an opportunity to bond.

16 In ordinary circumstances, a parent's refusal to accompany a child back to the place of habitual residence from which the child has been unlawfully removed is not a valid or acceptable reason for not making an order. In most cases, a mother can be reassured by appropriate conditions as to safety so that the child will not be placed at risk, and thus can return in those circumstances.

17 Few cases acknowledge the “bonding” argument by refusing the chasing order. They depart from previously reported cases, which deal with this issue.

18 One such case is *Steffen F. v. Severina P.* <sup>4</sup>. A U.S. Court held that despite a particularly outrageous case of wrongful removal by the child's mother, the return of a three year old child to Germany would disrupt the child's bonding, and would likely cause the child to suffer long term psychological damage.

19 A second case is *Johnson v. Fowler-Winning* <sup>5</sup>. The parties are unmarried and live in Montreal where their child is born in 1996. The relationship between the parties deteriorates. The basic cause of the rift is the father's connection with drugs and friends who deal with drugs. The mother suggests that their flat is used to process or organise the business of supplying drugs. She also fears for her own safety, having received threats. In March 1997, the mother leaves Canada, bringing her son with her to England. The chasing order is denied:

I think that there has been a genuine threat to the mother which has put her quite obviously in fear. I believe that she is in fear for her safety if she returns to Montreal. (...) it would be, in my judgment, wholly inappropriate to send this little boy of two years back without his mother to, in effect, a father who, I believe, has beer., and

probably still is, concerned in the drugscene. I do not believe that the child could properly be placed in that environment.<sup>6</sup>

### **The settling down of the child in his new environment**

20 Neither the Convention, nor the Act define “settling down”, translated as *intégration*. In *Droit de la Famille - 2785*,<sup>7</sup> the Quebec Court of Appeal states:

Il faut donner son sens ordinaire au mot «intégration», qui n'est pas défini dans la convention ni dans la loi. Il n'y a pas que l'aspect matériel qui doit être considéré, mais aussi l'aspect psychologique.<sup>8</sup>

In *Droit de la famille - 1427*,<sup>9</sup> Justice Plouffe refuses the order and notes that a period of 20 months has elapsed between the wrongful removal of the child and the commencement of the proceedings. He concludes to the settling down of the child in her new environment in those terms:

Vu l'âge de K. son apprentissage de la langue française, son insertion dans une nouvelle cellule familiale, sa fréquentation de l'école primaire ici au Québec, l'existence de nouveaux amis, son comportement en général et l'opinion de M. Séguin, le Tribunal conclut que l'intimée a établi par prépondérance de preuve que l'enfant s'est intégrée dans son nouveau milieu. Comme suite de ce qui précède, il n'est pas dans l'intérêt de l'enfant que le Tribunal ordonne son retour aux États-Unis.<sup>10</sup>

The purpose of the one-year delay is discussed by the Cour de Cassation in *Rajaratnam v. Rajaratnam*.<sup>11</sup> One reads:

(...) That usually the return of the child within one year is not detrimental to the child because he or she is still used to his or her prior environment.

### **The Law as applied to the evidence**

21 Weighing the evidence, the court gives much more credibility to the Respondent and her witnesses, than to the Applicant's. His wilful blindness as to his real activities through his Unique Escort Agency, and his lack of sincerity are noted by the court. His testimony is vague and carefully selective.

22 There are discrepancies in the Respondent's testimony, as well. They are not surprising, considering the amount of information relayed to the social worker who drafts his report based on his conversations with Mrs B. To an uninformed listener, Mrs B.'s story may sound incredible. A video tape filed on record is an actual recording of the “The National Magazine” showing a documentary entitled “The Russian Mob Goes Global” produced by the British Broadcasting Corporation for its program “Correspondent” and licensed to CBC for broadcast in Canada.

23 The Respondent never watched the video or the original broadcasting. The description of her past life is compatible with the documentary seen by the Court, with their consent, outside the presence of the parties.

24 This case falls within the exceptions set forth in the Convention to the return of a wrongfully removed child. In particular, there is a “grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation” [article 13(b)]. There is also evidence that the child would suffer some psychological harm in being separated from his mother. The harm is severe enough to invoke Article 13(b). The psychological harm to the child amounts to an intolerable situation, even though its cause is mostly related to the mother.

25 This case is quite different from all the other cited by the Applicant. Having heard the evidence, having observed the parties during four consecutive days, the court concludes that there has been a genuine threat to the mother, which has put her quite obviously and rightfully in fear. The court also believes that the Respondent is in fear for her safety if she returns to Israel. As a result of the Applicant's behaviour towards her, the Respondent is still his psychological prisoner.

26 The Respondent expresses her fear in a letter written to the Applicant in August 1996 (R-3). She asks him not to terrorise her mother by calling her or popping up at her place. Mrs H. heard the Applicant's threats to the Respondent. She heard him telling her he would bury A. if she went to the police. The Applicant offered to pay Mrs H. to testify on his behalf if the Respondent went to the police.

27 The Applicant blames her for not having complained to the Police or having fled to a shelter for women. One wonders if they could afford her the protection, which she would require. This woman was taken to Israel on false pretences, sold to the Russian Mafia and resold to the Applicant who forced her to prostitute herself through his Unique Escort Agency. She was locked in, beaten by the Applicant and raped. She was threatened on multiple occasions in no uncertain terms. Obviously, the police authorities of Israel are unaware, so it seems, of the real activities of the Applicant and of his links with the Russian Mafia. Moreover, the Applicant declares that he has "friends in the police". He "gets his information", if needed.

28 The Applicant sends contradictory messages regarding his intentions towards the Respondent if she voluntarily returns to Israel. In a recent letter, (I-5, 1 April 1998) the Applicant tells her that she will be imprisoned upon setting foot in Israel. In an offer made through Mr K., he states that he will withdraw any charges against Mrs B. In his affidavit supporting his divorce proceeding (I-10), he asks for custody of the child. Doing so, he shows his intention to raise special reasons for which the Respondent should not have automatic custody of the child. The Laws of the State of Israel state children up to the age of six shall be with their mother unless there are special reasons for directing otherwise. (R-4, s. 25).

29 Even after the damaging evidence presented against him, the Applicant refuses to admit to prostitution activities. He admits managing an escort service but feels that what goes on between his employee and the client is none of his business. He receives the phone calls, contracts with the client for a set time and a firm price, drives his employee back and forth, but does not know what goes on behind closed doors. That wilful blindness surely explains why he also omitted the nature of his professional activities in the affidavit signed in Israel at the commencement of the proceedings. He satisfies himself with the idea that by not knowing, his professional activities do not fall within the definition of procurement, as stated in the Israeli Penal Code (s. 199 Penal Law 5737-1977, exhibit MC-1).

30 To show other professional interests, the Applicant files a letter from S. Trading Ltd., a Japanese company for whom he claims to have worked since November 1994 (R-11). The Respondent, who was married to him, never heard about that company. In the personal statement filed under R-5, he is said to be self-employed. The letter from S. is prepared at the request of the Applicant for fiscal reasons, and not for the present case. He then wanted to show that he was not self-employed.

31 Furthermore, the Applicant states that he threw S. out of his house upon realizing that she was a prostitute (par. 10 of his affidavit), thus suggesting his aversion for her occupation. S. had been his employee when he endorses that allegation.

32 Under such circumstances, it is impossible for the Respondent, who abducted the child, to go back with him. An intolerable situation would ensue for the child, if returned without his mother. The court cannot ignore the testimony of the social worker who noted the attachment of the child to the Respondent. Exceptional measures were taken to protect the child's best interest and to safeguard the bond between mother and child when the latter was taken to a foster family. The court cannot, either, ignore that the mother is genuinely in a state of fear. It would not be right to expect her to return to Israel at the present time or in the foreseeable future.

33 The court also shares the fear expressed by the impleaded party as to the security of the child, if returned to Israel under those circumstances. It would be, in the court's judgement,

wholly inappropriate to send this young child back without his mother to a father who has been, and probably still is, running his business, buying and selling Russian woman, depriving them of their freedom and forcing them to prostitute themselves. The Court is satisfied with the evidence showing that a few weeks before the hearing, the Applicant still answered the cellular phone used for his agency, contrary to his testimony. The Court also notes the thoughtlessness of the father who travelled extensively after the birth of his child, sending only an occasional package. The same lack of concern happened upon the return of the family in Israel in 1995. The Applicant was arrested by the Police and disappeared for several days, leaving the Respondent and the child to themselves, without money. He loudly claims that he has a large family in Israel. He never made any arrangements for them to help his wife and his child who stayed in a hotel, without news from him.

34 The child is on Canadian soil since August 1996. He lives in Quebec with his mother and Mrs H. since October 1996. It amounts to a delay of either 19 months (August 1996 to March 1998) or 26 months (August 1996 to October 1998), depending on the date chosen for the commencement of the proceedings, that is to say the first motion, which was never presented for hearing<sup>12</sup>, or the amended motion<sup>13</sup>. The length of stay debate is really academic since the Court accepts the defence of grave risk amounting to an intolerable situation.

35 It is, however, useful to note that the child has settled down in his new environment and that, much to her credit, the mother has taken the appropriate steps to protect the child's ethnic and religious roots. The child is enrolled in a Jewish private school where he learns Hebrew and English. He will also learn French, starting in a few semesters. The young boy has friends, both at school and at home and has settled in his new family life with his mother and Mrs H. His behaviour is excellent. The child is socially inclined and not aggressive with adults or his peers.

36 Removing him from his new home would be detrimental to the child who has already travelled from Byelorussia to Israel, moved from place to place in Israel, including three hotels and two apartments, and finally to Canada. As a matter of fact, he only lived 14 months in Israel, as compared to 9 months in Byelorussia and 26 months in Canada.

37 As a last argument, the Applicant raises the precariousness of Mrs B.'s status in Canada. She and the child are in Canada legally, claiming Refugee status. Her hearing was postponed on two occasions. The second hearing, set for 28 October 1998 was postponed, according to the Respondent, at the request of Me Heyeur, the attorney for the Applicant. Her statement is not denied.

38 The outcome of the hearing in front of the Refugee Board is irrelevant to the present case. If unsuccessful in her attempt to stay in Canada, the Respondent may choose to travel to another country. The only issue to be discussed by this court is whether or not the child should be returned to Israel.

**For all these Motives, The Court**

39

**DISMISSES** the motion;

**ORDERS** the provisional execution of this judgement notwithstanding appeal.

**WITH COSTS**

TRUDEL J.C.S.

*Me Sonia Heyeur*, for the Applicant.

*Me Marthe Carpentier* and *Me Suzanne Tessier*, for the Respondent.

*Me Jean-François Boulais*, for the Impleaded Party.

**ANNEXE**

**Documentation consulted**

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*Convention sur les aspects civils de l'enlèvement international d'enfants*, La Haye, 25 octobre 1980; *Troisième réunion de la Commission spéciale sur le fonctionnement de la Convention de la Haye sur les aspects civils de l'enlèvement international d'enfants*, La Haye 17-21 mars 1997, pp43-71;

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*Caro vs. Sher*, 296 N.J. Super. 594 [687 A.2d 354]; *Ciotola v. Fiocca*. 86 Ohio. Misc. 2d 24 (684 N.E. 2d 763);

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*International Child Abduction*, The Law Society of Scotland & Scottish Courts administration joint conference, 25<sup>th</sup> November 1996, MacKenzie Buildings, pp. 32-46

*Karides James Peter v. Karides Mary Louise* , Family Court, Melbourne No. ML. 2927 of 1995;

*Korowin William John vs. Korowin-Schreiner Nina S.*, District Court of Horgen, 4891072U/ER4s/ez;

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*The Limitations on Art. 13 (b) of the Convention on the Civil Aspects of International Child Abduction*, William M. Hilton, CFLS, 11 Am. J. Fam. L 139 (1997);

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Neault, Jean-Marc, "L'enlèvement international d'un enfant par un parent: Élément de solution et de présentation", Barreau du Québec, Service de la formation Permanente, Développements récents en droit familial, Cowansville, Les Éditions Yvon Blais Inc., 1992, 245-283;

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- [1.](#) S.Q. Chapter A-23.01.
  - [2.](#) Acts and Documents of the Fourteenth Session (1980). Book 1, Miscellaneous matters.
  - [3.](#) [1994] 3 S.C.R. 551 .
  - [4.](#) (D.Ariz. 1997) 966 F. Supp. 922.
  - [5.](#) Case No. CA 114 of 1997, Royal Courts of Justice, Strand, London, Sir Stephen Brown, 24 March 1998.
  - [6.](#) Idem. p. 12.
  - [7.](#) [1998] R.J.Q. 10 C.A. .
  - [8.](#) idem, p. 20. Also to that effect, *Re N (Minors) (Abduction)*, (1991) 1 F.L.R. 413 (England); *Droit de la Famille-1763* [1993] R.J.Q. 2076 , p. 2084.
  - [9.](#) [1991] R.J.Q. 2252 . (C.S.).
  - [10.](#) idem, p. 2258.
  - [11.](#) Recueils de jurisprudence, Volume 1, Convention de la Haye sur les aspects civils de l'enlèvement international d'enfants, Québec, Ministère de la Justice.
  - [12.](#) The motion accompanied by a notice of presentation for March 10, 1998 at 11HOO is filed in Court the same day, at 16h 14. Therefore, it is never before the Court.
  - [13.](#) Recourse instituted in October 1998
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