CITATION: Habimana v. Mukundwa, 2019 ONSC 1781
COURT FILE NO.: FC-19-179
DATE: 2019/03/21

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
Olivier Habimana	Applicant	Allan Hirsch, for the Applicant
– and –		
Martine Mukundwa	Respondent	Selim Levy, for the Respondent
		HEARD: March 14, 2019 (at Ottawa)

AMENDED REASONS FOR JUDGMENT

The text of the original Reasons for Judgment of March 19, 2019 was amended on March 21, 2019 and the description of the amendments is appended.

LINHARES DE SOUSA J.

INTRODUCTION

[1] The matter before the court is a proceeding under the Hague Convention on the Civil Aspects of International Child Abduction, incorporated as the *Children's Law Reform Act*, s. 46 (the "Hague Convention") brought by the Applicant father, Olivier Habimana, seeking an order to have his sons, Micah Tuza Habimana (born 28 April, 2014) and Joshua Ntwali Habimana (born 28 December, 2011) returned to Hong Kong forthwith.

[2] The Respondent mother, Martine Mukundwa, contests the application pursuant to Article 13 of the Hague Convention and seeks a disposition that the children not be returned to Mr. Habimana in Hong Kong and that they be permitted to stay with her in Canada. She also seeks

police assistance. Finally, she also seeks an order that the Ontario Superior Court of Justice, Family Court has the jurisdiction to determine the merits of the children's custody and access.

[3] Alternatively, Ms. Mukundwa seeks an order that the court reserve its decision until the parties determine whether Ms. Mukundwa will be permitted to return to Hong Kong on a permanent or semi-permanent basis. In the event that she can return to Hong Kong, she seeks an order that Mr. Habimana give certain identified undertakings, relating to conditions to be followed upon her return to Hong Kong with the children.

[4] Both parties seek their costs of this application

BRIEF FACTUAL BACKGROUND

[5] The relevant factual context of these proceedings is the following. The parties were married in Montreal, Quebec, Canada in 2008. Mr. Habimana is a Norwegian citizen and Ms. Mukundwa is a Canadian citizen. Both the children are dual Canadian and Norwegian citizens.

[6] Following their marriage the couple lived in Paris, France and then relocated to Norway in 2009 to permit Mr. Habimana to pursue a postdoctoral fellowship. While in Norway, the first child, Joshua, was born. Ms Mukundwa at that time gave up her own program of studies because of her pregnancy.

[7] In 2012 the family moved to Dublin, Ireland so as to permit Mr. Habimana to pursue another postdoctoral fellowship. While there the second child, Micah, was born.

[8] In 2016 the family relocated to Hong Kong where Mr. Habimana was employed at the University of Hong Kong as an Assistant Professor of Biology, on a tenure track. Throughout the marriage Mr. Habimana had been the income earner for the family. Ms. Mukundwa dedicated her time to care for the children and the family's home.

[9] In order to be able to work in Hong Kong Mr. Habimana obtained a valid employment visa for Hong Kong. Ms Mukundwa and the children were dependents on the visa of Mr. Habimana. Mr. Habimana's employment visa will expire on June 29, 2019. It was his evidence that his employment contract with Hong Kong University has been renewed and extended by at

least one year to June of 2020 with the option to continue to 2022 if certain conditions are met. Mr. Habimana has accepted this offer. It was the evidence of Mr. Habimana that he will fill out any necessary forms agreeing to continue to sponsor his wife and the children so they can continue to live in Hong Kong.

[10] When the events leading to these proceedings commenced the family was living in a two-bedroom flat on Lackhart Road, Wan Chai, Hong Kong. The children attended school at the Delia School of Canada. Their enrolment in that school continues to be open to them.

[11] The evidence supports the finding that this couple was experiencing matrimonial discord for some time and certainly prior to their move to Hong Kong. The matrimonial conflict included relationship issues as well as financial ones. Ms. Mukundwa's family in Canada were aware of the matrimonial difficulties as told to them by Ms. Mukundwa. Neither the police nor any child welfare authorities have been involved with this family. Mr. Habimana has never been involved in any criminal proceedings.

[12] In the summer of 2018, Ms. Mukundwa along with the two children came to Canada and spent time with her family in Quebec. Mr. Habimana was also supposed to accompany the family on that visit but did not allegedly because of finances and his work demands. Ms. Mukundwa returned to Hong Kong with the children at the end of August, 2018. The matrimonial difficulties between the parties had not been resolved and continued.

[13] In the early morning of September 20, 2018, Ms. Mukundwa left the matrimonial home with the two children, as a result of an altercation between the parents on how to handle Micah's persistent crying after the child awoke frightened from a nightmare. Unbeknownst to Mr. Habimana, Ms. Mukundwa recorded part of the argument that took place between the parents, which recording was presented as evidence. According to Mr. Habimana, the recording presented by Ms. Mukundwa did not include the complete exchange. During the argument, as a result of Mr. Habimana saying to Ms. Mukundwa to take the child "dehors", Ms. Mukundwa dressed both children and took them out of the house telling their father that she was going for a walk.

[14] Ms. Mukundwa eventually made her way with the children to a hotel where her sister, Gloria Ingabire, was staying. Ms. Ingabire had arrived in Hong Kong on September 18, 2018 without the knowledge of Mr. Habimana. She had informed Ms. Mukundwa of her intention to travel to Hong Kong on September 13, 2018 and she met with her the day after her arrival in Hong Kong, on September 19, 2018, the day before the altercation.

[15] It was the evidence of Ms. Ingabire that with the consent and support of her extended family, she travelled to Hong Kong to provide support to her sister, and to assist her to identify and connect with lawyers, social workers, psychologists and shelters to the extent that she needed these supports.

[16] On the very day Ms. Mukundwa left her home with the children, with the help of her sister, she attended at the law office of Mr. Side, who practices law in the law firm of Tanner De Witt of Hong Kong and sought legal advice from him. Ms. Ingabire had arranged to meet with Mr. Side before leaving Canada. This was followed by a visit to the Canadian Embassy. Ms. Ingabire also arranged for hotel accommodation for the mother and the children until they could leave Hong Kong the next day. She then also arranged for all of them, Ms. Ingabire, Ms. Mukundwa and the two children to travel from Hong Kong to Ottawa the next day, on September 21, 2018.

[17] Before leaving, Ms. Mukundwa returned to her home twice, in the absence of Mr. Habimana, to obtain the travel documents and other personal items for herself and the children. On September 22, 2018, Ms. Mukundwa informed her husband that she and the children were in Ottawa, which came as a total surprise to him.

[18] Mr. Habimana had been attempting to locate his family when he was informed by Ms. Mukundwa that she and the children were in Ottawa and living with Ms. Ingabire's family. The children have been enrolled in school in Ottawa and according to Ms. Mukundwa, are doing well.

[19] Ms. Mukundwa has sought out psychological counselling with Dr. Susan Baxt for herself. She also began counselling the children.

[20] Ms. Mukundwa and Mr. Habimana have communicated with each other since Ms. Mukundwa's arrival in Canada with the children. Together with help from their extended family, the couple explored what could be done to resolve their situation, including mediation and other negotiations to establish conditions of return to Hong Kong, but without success of any agreement. Mr. Habimana has also regularly communicated with his children since they left Hong Kong.

[21] At the end of November, 2018, Mr. Habimana contacted the Hong Kong Central Authority in an attempt to get his children back to Hong Kong voluntarily, but without success.

[22] He then commenced these proceedings at the end of January, 2018.

ADMISSIONS

[23] At the commencement of these proceedings various admissions were made which greatly reduced the number of issues before this court for determination. They are the following:

- It is admitted that Hong Kong is the children's "habitual residence" within the meaning of the Hague Convention;
- It is admitted that Ms. Mukundwa removed the children wrongfully from Hong Kong and wrongfully retained them in Canada, against Mr. Habimana's wishes and in breach of Mr. Habimana's rights of custody of children which he enjoyed with Ms. Mukundwa prior to her removal of the children; and
- Mr Habimana's application pursuant to the Hague Convention was brought in less than one year after the wrongful removal pursuant to Article 12 of the Hague Convention and that this court is the correct forum for the application.

THE PURPOSE OF THE HAGUE CONVENTION

[24] It is not contested that the purpose of the Hague Convention is "to protect children internationally from the harmful effects of their wrongful removal or retention from the place of their habitual residence and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access" (see *Katsigiannis v. Kottick-Katsigiannis*, 2001 CanLII 37565 (Ont 2909, (C. A.) (para. 15)).

[25] Article 12 of the Hague Convention establishes that where it is found that a child has been wrongfully removed or retained, the return of the child is presumptively mandated in the following words:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith (the Hague Convention, Article 12).

[26] Furthermore, the "best interests of the child" test is not engaged in an application of this kind. This is because it is accepted that the Contracting State, to which the child is returned, the child's habitual residence, will through its own law, court processes and procedures take the best interests of the child into account (see *Jabbaz v. Mouammar*, 2003 CanLII 37565 (ON CA), paras. 23 and 24) and *Ellis v. Wentzel-Ellis*, 102 O.R. (3d) 298 at paras. 17 and 50)).

[27] Nonetheless, where a parent is not able to properly access the legal system, for whatever reason, in the Contracting State of the child's habitual residence, the court may consider applying the Article 13(b) defence. That factor was considered relevant in the following two cases.

[28] In *Hage v. Bryntwick*, 2014 ONSC 410, paras. 62-64, Mazza J. refused a father's Hague Convention Application finding that to return the child to his habitual residence in California would necessarily separate the young child from his mother and the only care giver he has ever known. The facts indicated that the father, while having prepared the immigration application for his child, was instrumental in prohibiting the mother from entering the United States by shredding her immigration papers and divorcing her. Another factor considered important by

Mazza J. as contributing to the grave risk of physiological and psychological harm to the child if he were to be returned to California was that the child was currently being monitored by a team of medical professionals regarding his communication developments skills. That care and treatment, too, considered essential, would also be disrupted.

[29] In the case of *Chan v. Chow*, 2001 BCCA 276, the court, having found that Hong Kong was the child's habitual residence and even though in the normal course she should have been returned to Hong Kong, the child was not ordered to return for a number of reasons, the mother's instability and attempts to hide the child from the father being some of them. In addition, the court considered important the fact of the father's inability to travel outside Canada because he was serving a two-year conditional sentence in Alberta. As a result, the father would not be able to protect his or the child's interests in any foreign custody proceedings for the duration of his sentence. The court found that the father's custody rights and access rights would be immensely jeopardized if the child were ordered to be returned to Hong Kong.

[30] On the facts of this case and based on the evidence presented relating to Hong Kong family law, it is accepted that the Hong Kong courts are well able to act to ensure the children's best interests in family law proceedings.

THE DEFENCE OF RISK OF GRAVE HARM

[31] The presumption under Article 12 of the Hague Convention may be rebutted by the defense found in Article 13, the relevant parts of which, for the purposes of the facts of this case, are as follows:

> Despite the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:
>
> > (a) …
> > (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 in to 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.

[32] Ms. Mukundwa relies on the defense established by Article 13 of the Hague Convention. This is the sole substantial issue before the court. With respect to the last part of Article 13, concerning the views of the children, it is conceded by Ms. Mukundwa that both children have not attained an age or degree of maturity at which it would be appropriate to take their views into account.

ISSUE BEFORE THE COURT AND POSITIONS OF THE PARTIES

[33] The issue before the court can be formulated as follows:

> On the facts of this case, is there a grave risk that returning the children to Hong Kong would expose them to physical or psychological harm, or otherwise place them in an intolerable situation?

[34] It is the position of Ms. Mukundwa that this court ought to find that such a grave risk exists of exposing the children to both physical and psychological harm, and of placing them in an intolerable situation if they are returned to Hong Kong. In support of her position that the children will be exposed to physical and psychological harm, Ms. Mukundwa identifies the following factors of her matrimonial circumstances and conduct on the part of Mr. Habimana:

- couple relationship conflicts involving bouts of jealousy and control by Mr. Habimana;
- the couple's longstanding matrimonial discord, particularly as it relates to financial issues;
- emotionally abusive behavior alternating between frequent and explosives bouts of outbursts of anger and long silent treatments to her and the children or refusing her intimacy;
- the angry outbursts were becoming more frequent and would involve slamming doors, kicking objects, shouting at her or criticizing her. Ms. Mukundwa also feared that these angry outbursts were becoming physical because he once threw a rolled up ball of paper at her;

- Mr. Habimana denigrated her and the value of her work with the home and the children. He took no responsibility for these tasks and concentrated on his work and prioritized it over the family. He began to spend less and less time with the children;
- Mr. Habimana was impatient with the children, was intolerant of their noise and messes and would shout and threaten them with physical violence, making the children anxious;
- Mr. Habimana was financially controlling and withheld needed money from her and the children and she had to rely on the generosity of her family;
- Mr. Habimana refused her suggestions of going to counselling;
- the recorded incident regarding Micah crying, keeping Mr. Habimana from sleeping, threatening to "frapper" Micah and ordering the mother to leave the house with the child; and
- that the children have suffered psychologically by the abusive conduct of their father as evidenced in the report of Dr. Susan Baxt, a therapist engaged by the mother to counsel herself and the children once she returned to Canada.

[35] For his part, Mr. Habimana does not deny that the couple were living in a situation of tension because of their various disagreements, especially with respect to financial matters and family spending priorities, and the stress of his employment demands and responsibilities. He does admit to, shortly before Ms. Mukundwa left the home with the children, in frustration throwing a balled up tissue paper at his wife, which he regrets.

[36] With respect to the allegations of Ms. Mukundwa, in support of her defense, Mr. Habimana denies that:

- he had uncontrolled outbursts of anger, shouting, hitting walls and kicking things. His evidence was that when he was feeling frustrated and angry he frequently went out for a walk until he could calm down;
- he did not provide financially for his family and that he did not meet all of their material needs. According to Mr. Habimana, finances were a serious source of disagreement between the parties and he provided financially for the family as best he could;

- he was an absent parent. His evidence was that they shared child care responsibilities and that he engaged with his children and was active in their lives;
- he emotionally abused his wife and children with impatience, disengagement and long silences;
- in the early hours of the September 20, 2018 incident, he was shouting and tried to grab Micah in the way suggested by Ms. Mukundwa. He does not deny that he was extremely frustrated during this incident and that when he used the word "frapper", his intended meaning was "spank", as both parents had done before, albeit rarely, and not "beat" as suggested by Ms. Mukundwa. Mr. Habimana denied that he ever exercised physical abuse against his wife or children; and
- his intention was that his family should go out and walk the streets, when he said they should go "dehors". It was Mr. Habimana's evidence that Ms. Mukundwa aggravated the incident of September 20, 2018 so she could leave the home with the children. Her intention, according to Mr. Habimana, had been formulated earlier in order to comply with her family's determination to have her return to Canada.

[37] It was the evidence of Mr. Habimana that his children did not exhibit anxiety or soiling behavior when the family lived together in Hong Kong. Mr. Habimana is concerned that this new behavior on the part of the children, as described by Dr. Baxt, could be related to their abduction, being separated from him and living with extended family members that are hostile to their father.

THE LAW RELEVANT TO GRAVE RISK OF HARM

[38] The jurisprudence relating to the grave risk of harm defence, pursuant to Article 13(b), provides for a rigorous and exacting test. The case law supports the conclusion that the risk must be "grave", "weighty" and "severe", on a balance of probabilities (see para. 28 of *Finizzio v. Scoppio-Finizzio*, 1999 CarswellOnt 3018 (C.A.) as guided by *Thomson v. Thomson*, [1994] 3 S. C. R. 551, CanLII 26).

[39] Similarly, the term "intolerable" applies to circumstances that are "grave", "extreme" or that are "unbearable; a situation too severe to be endured" (see *Jabbaz v. Muammar*, 2003

CanLII 3765 (ON CA), para. 23). On the facts of *Jabbaz*, *supra*, the Court concluded that returning a child to a country where their immigration status remained uncertain and unregularized did not approach the high threshold of "intolerable situation" (paras. 25 and 26).

[40] The high threshold of "grave risk of harm" defence was demonstrated in the case of *Pollastro v. Pollastro*, 1999 CarswellOnt 848 (C.A.) where the mother met the onus under Article 13(b) by unequivocally proving that the father had been severely abusive and threatening to her and causing her physical harm, had behaved irrationally and irresponsibly, had drug and alcohol problems, was unpredictable and unreliable with respect to his responsibility for child care and had violent and uncontrolled outbursts of anger, often towards his wife (para. 32).

[41] In *Mahler v. Mahler*, 3 R. F. L. (5^{th}) 428, the Manitoba Court of Appeal refused a mother's defence pursuant to Article 13(b), where it was alleged that the father was unreliable in meeting his support obligations and was physically and verbally abusive toward the mother, consisting of pushing her, kicking doors and raising his voice. The evidence presented by both parties was conflicting and there was no evidence that the father had ever physically harmed his children.

[42] In the case of *Hassan v. Garib*, 2017 ONSC 7227, para. 9, Engelking J. recognizing the high threshold test established under an Article 13(b) defence and relying on the decision of *Achakzad v. Zemaryalai*, 2010 ONCJ 318 (CanLII), considered thoroughly the facts of her case (including alleged acts of physical violence), in light of three questions:

1. Has the alleged past violence been severe and is it likely to recur?
2. Has it been life-threatening?
3. Does the record show that Mr. Garib is not amenable to control by the justice system?

[43] Engelking J. refused the defence and ordered the child to be returned to the State of his habitual residence.

[44] In keeping with the requirement that there is a high threshold for establishing grave risk of harm, some cases have not limited the inquiry to the alleged conduct of the parent alone, but have considered as well the physical and psychological consequences of an order of return, outside of parental conduct. One such example, referred to in *JS v. RM*, 2012 ABPC 184, para. 57, of posing a grave risk to a child was sending a child into a zone of war, famine or disease, or in cases of serious abuse, or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason may be incapable or unwilling to give the child adequate protection.

[45] Both parties have presented conflicting evidence regarding the matrimonial circumstances and the events that preceded Ms. Mukundwa leaving Hong Kong with the children in September of 2018. While the respective evidence of both parties presents a very unhappy and stressful marriage with many unresolved conflicts, I am not convinced on all of the evidence and on a balance of probabilities that the stringent test mandated by Article 13(b), that these children, if returned to Hong Kong, would be exposed to physical or psychological harm. There is no evidence of the father physically or psychologically abusing the children. His communications with the children since they have been in Canada are appropriate and loving and do not demonstrate fear on the part of the children.

[46] The throwing of the rolled up paper can be considered physical abuse by the father against the mother. However, it appears to be an isolated incident and did not cause any lasting physical harm to the mother, although it certainly did not help the marriage relationship. While I do not in any way wish to minimize the subjective experience of Ms. Mukundwa in her marriage, the conflict she had over financial issues, being subjected to confrontational, abusive and disrespectful behavior, as she perceived her husband's conduct towards her, it does not satisfy the grave risk of harm test set out in the case law mentioned earlier.

[47] Ms. Mukundwa provided evidence that she consulted a lawyer, Mr. Mark Lovell Side, before she left Hong Kong in September of 2018, concerning her family law issues and what measures were available to her to protect her interests and those of the children. Mr. Side through affidavit material has provided substantial detail in two letters about what recourse and relief Ms. Mukundwa can seek from the Hong Kong courts (see volume 3 of the Continuing

Record, tabs 1 and 2, First Letter). That evidence indicates clearly that if the children were to be returned to Hong Kong and Ms. Mukundwa returns with them then, her family law interests will not in any way be jeopardized. If she chooses, she can pursue all of her complaints against her husband in the Hong Kong court system and seek remedies, very comparable to remedies she would seek in the Canadian court system.

[48] In addition to this, the evidence of Mr. Side indicated that if Mr. Habimana gives certain undertakings, "mirrored in Hong Kong", which Mr. Side suggested in his letter dated February 28, 2019, then undertakings given by Mr. Habimana could be enforced in Hong Kong, as a further protection to Ms. Mukundwa until matters could be finally determined by the Hong Kong Family Court.

ISSUE OF INTOLERABLE SITUATION: IMMIGRATION STATUS

[49] Ms. Mukundwa raises the issue of her uncertain and precarious immigration status in Hong Kong should Mr. Habimana choose not to renew her dependent's visa. The evidence before the court is that Mr. Habimana's visa expires at the end of June, 2019. There is no evidence that Mr. Habimana has applied to renew his visa or those of his children and of his wife. Ms. Mukundwa is concerned that she and the children would return to Hong Kong and then within a matter of months have to leave or she would have to leave without the children. Counsel for Ms. Mukundwa argues that this uncertainty creates a grave risk of exposing the children to an "intolerable situation" where they would be uprooted again or be separated from her as their primary caregiver.

[50] With respect to this issue, among other undertakings, Mr. Habimana is willing to give, he indicates in his Affidavit, dated March 8, 2019 (volume 3 of the Continuing Record, tab 11, para. 32) that he "will fill out any necessary forms agreeing to continue to sponsor Martine and the children".

[51] Mr. Side has also provided an opinion about Ms. Mukundwa's immigration status in the event she returns to Hong Kong and the couple live separately (see volume 3 of the Continuing Record, tabs 1 and 2, Second Letter). In my reading of his opinion, it appears that if he wishes to stay in Hong Kong and continue working, Mr. Habimana will have to apply to extend his own

visa "within 4 weeks of the visa's expiry. This will also need to be done for Martine Mukundwa and the children's visa which will also require Olivier Habimana to fill out a form agreeing to sponsor the visas."

[52] With respect to the children, as long as Mr. Habimana could show his capacity to financially support the children and provide adequate housing for them, they will qualify as minor dependants.

[53] With respect to Ms. Mukundwa, Mr. Side indicates that although a separation may negatively impact an application for the extension of Ms. Mukundwa's visa, one cannot conclude this with certainty. It ultimately is up to the interpretation of the dependant visa policy and the discretion of the officer handling the application.

[54] It was also the opinion of Mr. Side that if Ms. Mukundwa were not granted an extension of her dependent's visa, she could still stay in Hong Kong as a visitor for 90 days on the strength of her Canadian passport. She could also ask Hong Kong immigration for special permission to stay in Hong Kong while the family law proceedings are going on.

[55] Based on the foregoing, and considering Mr. Habimana's willingness to apply for dependants' visas for the children and for Ms. Mukundwa, it is not at all imminent nor certain that if Ms. Mukundwa were to return to Hong Kong with the children she would find herself having to leave with or without the children in the near future for reasons of her immigration status. The facts of this case are very different from those found in *Hage v. Bryntwick*, *supra*, ("definite certainty" mother would not be admitted to California (para. 63)) and *Chan v. Chow*, *supra*, (father under a clear prohibition from leaving Alberta).

[56] On the facts of the case before the court, I cannot conclude that, if the children are ordered to return to Hong Kong, Ms. Mukundwa would not be able to accompany them and there remain to pursue her interests and those of the children in family law proceedings in Hong Kong because of her immigration status.

[57] For the same reason, she would be able to pursue her family law rights immediately upon her return to Hong Kong. In fact, she has already consulted with a lawyer in Hong Kong about

her family law rights. There is, therefore, no justification to postpone the disposition of this court and I decline to do so. In my view, it would be contrary to one of the principal objectives of the Hague Convention, namely, to deal expeditiously with the wrongful removal of children and to secure the prompt return of children wrongfully removed or retained in any Contracting State (see *Katsigiannis v. Kottick-Katsigiannis*, *supra*, para. 16.)

[58] As a result, I find that on this ground too, the stringent test of proving, pursuant to Article 13(b), that there is a grave risk that returning the children to Hong Kong will expose them to an intolerable situation has not been met.

UNDERTAKINGS

[59] For the reasons given above, the defense advanced by Ms. Mukundwa fails, and an order pursuant to Article 12 of the Hague Convention must be made.

[60] This court has the jurisdiction to incorporate into an order made pursuant to Article 12 of the Hague Convention, such undertakings as are necessary to secure the safe, prompt and seamless return of the children and to provide for the transition period between the time when a Canadian court makes a return order and the time at which the children are placed before the courts in the country of their habitual residence (see *Cannock v. Fluegel*, 2008 ONCA 758 paras. 13 and 27; *Czub v. Czub*, 2012 ONCJ 566, paras 45-46)).

[61] Mr Habimana, in the interests of having his children return to Hong Kong has indicated that he is willing to abide by any undertaking this court considers appropriate. He has also identified certain undertakings with a view to facilitating the return home of his wife and children.

DISPOSITION

[62] Accordingly, this court makes the following orders:

1. Pursuant to Article 12 of the Hague Convention, it is ordered that the two children, Joshua Ntwali Habimana and Micah Tuza Habimana, be returned forthwith to Hong Kong by their mother. Ms. Mukundwa is also ordered not to remove the children from

that jurisdiction until the Family Court in Hong Kong determines the merits of a claim for custody and access under its laws by interim or final parenting orders, or as the parties shall otherwise agree in writing.

2. If Ms. Mukundwa chooses not to accompany the children to Hong Kong, it is ordered that Ms. Mukundwa deliver the children into the care of the Mr. Habimana, or his designate in Ottawa, who shall return the children to Hong Kong forthwith.
3. It is ordered that Ms. Mukundwa shall contemporaneously deliver the children's passports and all other necessary travel documents in her possession or control to the father or his designate.
4. If Ms. Mukundwa breaches any of the order in paragraphs 1, 2 and 3 above, it is ordered that the police force in the area where the children may be located shall apprehend them and deliver them to Mr. Habimana or to his designate so that the children may be returned to Hong Kong.
5. Both Ms. Mukandwa and Mr. Habimana are ordered to abide by the following undertakings that this court considers necessary to effect the prompt and safe return of the children to Hong Kong with as little disruption to the lives of the children as possible, and to secure the seamless return to their lives in Hong Kong. The undertakings are also meant to deal with the transition period between the time of this court's return order and the time at which the children are placed before the courts in the country of their habitual residence.
6. Mr. Habimana shall pay for the airfare of Ms. Mukundwa and the two children to return to Hong Kong, forthwith.

7. Mr Habimana shall vacate the matrimonial home so that Ms. Mukundwa and the children, upon arriving in Hong Kong, can return to the matrimonial home and exclusively occupy the home. Mr. Habimana shall find alternate accommodation for himself.
8. Mr. Habimana shall pay voluntarily all the reasonable expenses of Ms. Mukundwa and the two children required to meet their daily physical and medical needs, including the rental expenses of the matrimonial home until a support agreement is negotiated by them or Family Court in Hong Kong makes an award for spousal and child support.
9. Mr. Habimana and Ms. Mukundwa shall cooperate to find a therapist for the children so that the children can continue to receive counselling, as was recommended by Dr. Baxt.
10. Mr. Habimana and Ms. Mukundwa shall as soon as reasonably possible, upon Ms. Mukundwa's return to Hong Kong with the children, seek out a mediator and/or commence legal proceedings in the Hong Kong Family court to deal with their family law issues.
11. The parties shall cooperatively and harmoniously parent their children until a final resolution of their matrimonial issues either by way of agreement or court order.
12. Mr. Habimana shall, within the required time, sign all documentation and make all applications required to obtain an extension of the dependants' visa for Ms. Mukundwa and his two children.

COSTS

[63] The last issue is that of costs. If the parties cannot otherwise agree, the Applicant shall have two weeks from the date of this order to serve and file his written submissions on costs, including any offers to settle. The Respondent shall have two weeks from that date to serve and

file her written submissions on costs, including any offers to settle. The Applicant shall then have one week from that date to serve and file a reply if he thinks it necessary.

Linhares de Sousa J.

Released: March 21, 2019

APPENDIX

The text of the original Reasons for Judgment was amended on March 20, 2019.

1- Mukwunda was corrected to Mukundwa.

2- Ms. Susan Baxt was corrected to Dr. Susan Baxt.

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SUPERIOR COURT OF JUSTICE

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REASONS FOR JUDGMENT

Linhares de Sousa J.

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