

ONTARIO COURT OF JUSTICE

CITATION: *Al-Hadad v. Al Harash*, 2020 ONCJ 269

DATE: June 3, 2020

COURT FILE No.: H 31600-19

B E T W E E N :

Mohammad Rateb Al-Hadad
Applicant

— AND —

Kaiema Al Harash
Respondent

Before Justice Debra Paulseth
Heard on May 25 and 26, 2020
Reasons for Judgment released on June 3, 2020

Kenneth E Snider counsel for the applicant
Barry Nussbaum..... counsel for the respondent

Paulseth J.:

Overview:

[1] The parties are the parents of A, a son born on [...], 2017, in Canada. They were married in Syria on February 17, 2016. They last lived together in Germany from June of 2017 until March of 2019.

[2] On March 30, 2019, the mother and child came to Canada.

[3] Father claims a wrongful retention by mother of the child in Canada and seeks a return to Germany, pursuant to the Convention on the Civil Aspects of International Child Abduction (known as the Hague Convention). His Application to this court is dated December 4, 2019. Father maintains he only agreed to a two or three week vacation by mother and child with the maternal family in Canada.

[4] Mother claims the marital relationship was characterized by a power imbalance, duress, coercion, and violence. When she left Germany, she advised father that she would not be returning and he drove mother and child to the airport.

On April 12, 2019, mother confirmed in a text message to father that she would not be returning, as she was “mentally and physically broken”.

Legal Framework for Hague Convention Application:

In general:

[5] Both Canada and Germany are signatory members to the *Convention of October 25, 1980 on the Civil Aspects of International Child Abduction*, known as the Hague Convention. This Convention is incorporated into Ontario legislation through section 46 of the *Children’s Law Reform Act*, R.S.O. 1990.

[6] The purpose of the Hague Convention is to enforce custody rights and secure the prompt return of children who have been wrongfully removed or retained. See *Ludwig v. Ludwig*, 2019 ONCA 680 at paragraphs 19 and 20 (referring to the decision of the Supreme Court of Canada in *Balev v. Baggott*, 2018 SCC 16)

[7] The Hague Convention is not concerned with determining rights of custody on the merits.

Threshold Agreements

[8] The parties agree upon these threshold factors:

(1) The convention is in force between Germany and Canada (Article 35).

(2) The child is under the age of 16 years, having been born on [...], 2017 (Article 4).

(3) The child has been wrongfully retained in Canada (Article 3), since approximately April 12, 2019, when mother said they were not returning to Germany.

(4) The child was habitually resident in Germany at the time of the wrongful retention. (Article 4).

(5) The parents and child were all residing together in Germany and father has custody rights arising from that relationship (Article 3) .

(6) The child was gone less than one year at the time that father’s Application was brought in December, 2019.

The Exceptions:

[9] The next step is to determine if the mother has established any of the defences set out in the Hague Convention. If she cannot establish a valid defence,

the child must be returned to Germany. The two articles of the Hague Convention applicable to this case are articles 12 and 13:

Article 12

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

Article 13

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 opposed 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.

Grave Risk of Harm:

[10] It is now well-settled law that a child who witnesses or experiences domestic violence by one parent can be at risk of psychological and emotional harm. See the Ontario Court of Appeal's decision in *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485, [118 O.A.C. 169](#); and also *Achakzad v. Zemaryalai*, [2010 ONCJ 318 \(CanLII\)](#), per Justice Ellen B. Murray, paragraphs 13 to 30.

[11] In *Pollastro*, the Court of Appeal held that a grave risk of harm to a child's primary caregiver can constitute grave risk of harm to a child in considering the Article 13(b) defence. The court overturned the lower's court's order in which the primary-caregiver mother of a young child had been ordered to return the child to California, despite the father's past assaults on and threats to the mother. Writing for the Court, Justice Rosalie Abella (as she then was) stated the following:

[33] ... it seems to me as a matter of common sense that returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm

In determining whether a return would place a child in an intolerable situation, the court held that it is relevant "to take into account the possibility of serious physical or

psychological harm coming to the parent on whom the child is totally dependent" (paragraph [34]). The court found that the infant child's "interests are inextricably tied to (the mother's) psychological and physical security," and reversed the return order.

[12] There is a high threshold to prove "grave risk" of physical or psychological harm as confirmed in many appellate authorities. Any interpretation of this exception, short of a rigorous one, would rapidly compromise the efficacy of the Convention. See: *Ellis v. Wentzell-Ellis*, 2010 ONCA 347 at paras. 38-40.

[13] An assessment of risk involves not only an assessment of the severity of the harm, but also an assessment of the likelihood of it occurring. See: *Andegiorgis v. Giorgis*, 2018 ONCJ 965 at para. 55; *Ojeikere v. Ojeikere*, 2018 ONCA 372 at para. 62.

[14] In *Hassan v. Garib*, 2017 ONSC 7227 (CanLII), the court recognized the high threshold test required by an Article 13(b) defence. In considering the allegations before the court of physical violence, the court asked 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 the father is not amenable to control by the justice system?

[15] The credibility of the party seeking the Article 13 (b) exception is an important determinant in whether the children are to be returned. The quality and quantity of the evidence of the alleged violence and the credibility of witnesses is also important. See: *Husid v. Daviau*, 2012 ONSC 547, affirmed at *Husid v. Daviau*, 2012 ONCA 469.

[16] Many Article 13(b) claims that allege grave risk of harm to a child because of domestic violence directed towards his primary caregiver have failed in Canadian courts. The following is a brief summary of the reasons for refusing the claim:

- Sometimes the court is simply not satisfied on the balance of probabilities that domestic violence occurred. See, for example, *Ellis v. Wentzell-Ellis*, *supra*, footnote 2, where the abducting mother complained of verbally abusive and drunken behaviour, but not physical assaults or threats. See also *Moller v. Despoja-Moller*, [[2001] O.J. No. 5170 (Ont. S.C.); *Sierra v. Sierra*, [2001] O.J. No. 2044, 2001 (Ont. Fam. Ct.).
- Sometimes the court finds that the assault alleged was minor or a one-time occurrence. See *Finizio v. Scoppio-Finizio*, *supra*, footnote 2, where the court noted that there was only one "physical altercation" (a punch) in an 8-year marriage. Also see *Suarez v. Carranza*, [2008] B.C.J. No. 1657 (B.C.S.C.), where a push on two occasions was the violence alleged.

- Sometimes the court notes that, despite the violence alleged, the victim of the assault expressed no fear of the assailant (*Suarez v. Carranza, supra*), or that the violence alleged is not the reason that the abducting parent declines to return with the child to the requesting state. In *Cannock v. Fleguel*, [2008] O.J. No. 4480, (Ont. C.A.), the court found that the mother did not want to return to Australia because of the hardship that it would work upon other children in her custody.

Domestic Violence and Role of the Contracting Country:

[17] In considering cases involving domestic violence, the court must be mindful of the presumption that the courts of another contracting state are equipped to make, and will make, suitable arrangements for the child's welfare, which will implicitly include providing protection for a primary caregiver returning with the child. See: *Finizio v. Scoppio-Finizio, supra*, paragraph [34](#).

[18] The court should also consider whether undertakings given by the left-behind parent would be effective in remedying the risk of harm, when determining the Article 13 (b) exception. See: *Cannock v. Fluegel*, [2008 ONCA 758 \(CanLII\)](#).

The Facts in this Case

[19] Both parents are from Syria. Both parents are well educated.

[20] Mother attended five years of university in Syria in the field of medical dentistry. She studied the German language both in Syria and in Germany with a view to practicing dentistry in Germany at some future point in time.

[21] The parents were introduced in late 2015 and married by Sharia law in Syria on February 17, 2016. Father was not actually present for the ceremony, but as is their custom, the father's father stood in for him. Mother moved to Germany to be with father but returned to Canada where her parents and other family members live to have the baby. Mother has permanent residency status in Canada.

[22] Mother and the baby went to Germany to be with father in June of 2017 and remained there until they flew to Toronto on March 30, 2019.

[23] Father is a full time student in a Master's program for pharmaceutical engineering at a university about two hours away from their home in Germany. As their form of marriage was not legal in Germany, the parents signed a joint custody agreement, to support their student loan financial assistance.

[24] The family apartment is in a large community of other Syrian families. Mother took German language lessons. She needed to pass a proficiency test in German. She actually missed her test which was scheduled shortly after the birth of this child. She also requires completion of further dental qualifications.

[25] Mother found the father to be very controlling from an early stage of the marriage. He insisted that she not have her own bank account and that she be prepared to have children and take care of the home. Father disagrees with this characterization and testified that mother closed her own bank account due to the high bank fees. He says mother has her own bank card that will access their joint account.

[26] Mother deposed that she was always and consistently the primary caregiver for the child; in that:

- (1) Father was gone from early morning until evening and on weekends he went to the library.
- (2) Father had no interest in parenting, and apparently little parenting knowledge as he demanded the child be trained away from diapers at the age of one year.
- (3) Father refused to buy the child any toys including developmentally educational toys and would be furious if mother bought a toy.
- (4) Father was very impatient with the normal frustrations and demands of a young child.
- (5) Mother organized and attended all medical appointments with the child.

[27] Father testified that he did not attend the university every day and that he went to all the child's medical appointments unless he had class or the appointment was merely for an immunization.

[28] Mother describes her life with the father as a "living hell". She says he abused her verbally, physically and sexually. He only came home to have sex and sleep and eat. Father has a very quick temper and reacts angrily if he perceives the mother is not being readily obedient. Mother was not permitted to leave the apartment or even open the curtains without his approval.

[29] Mother gives several examples of physical violence by the father to her:

- (1) In June of 2018, when mother wanted the family to go to a nearby park and father didn't want to go, father pounded on mother's head with his knuckles. He said "no one gets out of this house without letting me know."
- (2) In October of 2018, father locked her in the apartment for almost 4 hours. Her parents were visiting and staying nearby. Her parents came to Germany from Canada because she was so unhappy and they negotiated with the father that he would not abuse her further.

(3) The very next month, father became angry that mother bought a toy for the child and attacked her by kicking her. He said “you must only do what I say.”

(4) On February 14, 2019, the father became enraged when mother hung up the phone on him. He shoved her to the ground and began kicking her. When she ran to another room, he kept hitting her and said “I am the only one who gets a say in this house.”

[30] After this last incident, mother took the child and stayed in a hotel for two nights.

[31] Father denies ever hitting the mother but admits he pushed her during the incident on February 14, 2019. In an exhibit showing a text exchange between the parents at this time, father does say he will not hit her again.

[32] Father testified that the written agreement between the parents occurred in 2017 and contained clauses such as:

(1) Father would increase the amount of money he gave the mother for the household and he agreed to open a joint bank account.

(2) The family would not intervene in the affairs of the couple.

(3) The mother and father were to have mutual respect for each other. Mother was not to see herself as above the father and treat him badly.

(4) The parents were to stop any future pregnancy until this child was 2 and then the mother would have a brother for this child.

(5) Father was to give support to the mother in her continued language classes and her specialty studies.

[33] There is no allegation of the mother ever treating the father badly.

[34] Mother deposed that she was very isolated in Germany. She said that in the Syrian culture family problems are only solved from within the family. She would never call the police as they have a reputation for arbitrary violence in Syria and it is not their culture’s way of dealing with private matters. She knew the injuries did not require medical attention. She was also warned by people in the community to not contact the local children’s aid authorities as they might take her child from her.

[35] Father denies that mother was isolated, citing her German language classes and her teaching of the Koran at the mosque as examples of her activity in the community.

[36] Mother also testified about emotional trauma caused to her by the father:

(1) Father ridiculed her size when she was pregnant and described her as a cow when she breastfed their child. Father denies this.

- (2) In addition to the cultural isolation within a Germany city, father kept her isolated from others through his rules of the house; such as closed curtains.
- (3) Mother was financially dependent upon the father, and not permitted to spend money without his express approval.
- (4) Mother provided a print out of the log in information for her social media accounts which showed a log in from Garbsen, Germany when mother was already in Canada. The parents' apartment in Germany is in the city of Garbsen. Mother testified that the father was logging into her accounts and monitoring her social media. Father admits he did open her Facebook by mistake as she had not logged out.
- (5) Mother described her life as like living in a prison.

[37] In her evidence, mother became very distraught in describing the power imbalance and abuse in their relationship. At one point she blurted out that she was so stressed that she had lost a lot of weight and half of her hair was gone.

[38] Mother gave an example of the child starting to imitate the father's behaviour and striking her repeatedly on her head.

[39] On several occasions, mother says that father physically disciplined the child:

- (1) When the child was only 14 months old, the father dragged him out of the kitchen on the floor and slammed the door on the child, because the child had made a loud noise with the oven door. The child was crying.
- (2) In August of 2018, the child accidentally hit the father's eye and the father grabbed him and repeatedly threw him hard against the bed. The child cried very hard.
- (3) In September of 2018, when the child grabbed a wash rack, the father hit him on the arm. The arm was red and the child cried .
- (4) In March of 2019, the child woke the father up by playing with a toy and the father tried to break the toy in front of the child, causing the child to sob.

[40] Father denies ever hitting the child. In his affidavit he speaks of taking the child to the park and the zoo as a family.

[41] Mother and child flew to Canada on March 30, 2019. Maternal grandfather bought the tickets which included return flights on April 20, 2019. Father believed it was for a vacation for two or three weeks. He did not seem to know the return date. Mother said she told him repeatedly that she was not returning. Mother said she

packed most of her belongings and left what she could not carry in a packed travel bag.

[42] In a text exchange with father on April 12, 2019, mother said she was “mentally and physically broken” and could not return to Germany on April 20, 2019.

[43] Father gave several explanations for mother’s dissatisfied state:

- (1) She had back problems requiring rest.
- (2) Mother’s family was wealthy and she missed that lifestyle.
- (3) Father testified that mother left most of her belongings in the apartment, but he provided no photo of her things there, despite many other photos in evidence

[44] A former teacher of the mother’s gave evidence from Syria. She was contacted by father in June of 2019, and asked to intervene. This teacher was the mother’s spiritual advisor and teacher when the mother was younger and living in Syria. This teacher is also an employee of the maternal grandfather’s. Father asked her to negotiate a reconciliation with the mother. She testified that she very clearly asked him what was wrong and he told her that he had beaten the mother more than once. Father told her that he:

- (1) “did wrong to her” (the mother);
- (2) “laid his hands on her (the mother) more than once”; and
- (3) “was remorseful”,

[45] This teacher agreed to act as intermediary and approached the maternal grandfather with this offer.

[46] Father admitted that he had asked this teacher to intervene. He said he had asked a lot of family members to intervene. He admitted he told her he hit the mother but he really meant just the push he gave her during the February 14th event.

[47] The child’s paediatrician in Toronto gave evidence and provided a report. She observed the child in several office visits after birth and then when the mother returned to Toronto. She described the child shortly after returning to Canada to be “extremely anxious”. She said that the mother told her she had been abused in the relationship by the father.

Onus and Burden of Proof

[48] The onus is on the mother to prove on a balance of probabilities that the exception applies in this case.

[49] The threshold, however, is high and requires a very rigorous assessment of the evidence of the severity of the harm and the likelihood of its occurring, thus causing grave risk of physiological and psychological harm to the child or otherwise placing the child in an intolerable situation.

Credibility of the Mother:

[50] Father denies ever hitting the mother or the child. He testifies that the mother was simply on a vacation to see her family. This view defies common sense as six weeks earlier the mother had gone to a hotel to get away from him. At that point, her whole body hurt her from his beating.

[51] I find mother to be more credible than father for these reasons:

- (1) Mother at no time exaggerated the severity of her injuries. She stated they did not require medical attention. She said her whole body hurt at times and she was bruised but nothing was broken. She described the child's injuries as more emotional, without any bone being broken. He cried and sobbed.
- (2) Some of mother's most important evidence had to be pried out of her.
- (3) The evidence in the text messages from father and the paternal grandfather (not disputed by father), supports the mother's evidence.
- (4) The evidence of the former teacher who was approached by the father supports the mother's evidence.

[52] Father says mother never sought police or medical assistance so she must be lying. Both mother and father's family support the mother's version of events and none of them suggested she seek support outside the family.

Has the Violence been Severe?

[53] Father maintains there was an isolated incident of "pushing" by him in February of 2019.

[54] Mother maintains that there has been a pattern over two years of hitting and kicking and pounding on her head. I accept mother's version of events as more credible. The question arises then – does that version amount to severe violence?

[55] No one incident, as described by mother, is severe. Can the court quantify when a number of incidents add up to the required level of severity for this exception? I find on the facts of this case that the cumulative pattern of physical abuse is severe and significant, because:

- (1) The abuse occurred over two years;

- (2) The father kept apologizing and saying it wouldn't happen again and it did;
- (3) Father now denies the abuse;
- (4) Mother only gave some examples but said there were more. Mother appeared very reticent throughout her evidence. She did not want to exaggerate;
- (5) Mother was and is afraid of father and actually tried to leave him on more than one occasion; and
- (6) The violence appears to be escalating- it began with denigrating comments and strikes with his hand and fist and progressed to violent kicking.

[56] The court finds that the abuse will happen again. The father's denial and minimization of the abuse indicates that he has no insight into the harm he has caused to the mother and to the child.

Isolation and Coercion:

[57] There is no real dispute that the father kept the mother isolated. His examples of English classes and teaching at the mosque did nothing to dispel the mother's description of the oppressive nature of life with him.

[58] The community within which the family lived in Syria was also insulated from Germany. Mother never left the Syrian community. Her English classes were within the community and the teaching was at her local mosque.

[59] For a broadened sense of what family violence means in 2020, the court takes some guidance from the changes to federal legislation. On July 1, 2020, the amendments to the **Divorce Act** in Canada (S.C. 2019, c. 16, s 1(7) will take effect. One of those amendments is the definition of "family violence" in subsection 2(1):

- (1) Family violence means any conduct... by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person- and in the case of a child, the direct or indirect exposure to such conduct- and includes:
 - (a) Physical abuse...
 - (b) Sexual abuse;
 - (c) Threats to kill or cause bodily harm...
 - (d) Harassment;

- (e) The failure to provide the necessities of life;
- (f) Psychological abuse;
- (g) Financial abuse;

[60] Many elements of this definition apply to this case.

[61] The court accepts that the mother endured a pattern of coercive and controlling behaviour at the hands of the father because:

- (1) Father did not permit mother to leave the apartment without his agreement;
- (2) Father did not permit her to open the curtains;
- (3) Initially, father would not let her have a bank card. His own evidence is that it had to be negotiated into the agreement of 2017. He did not deny that she still required his express permission to spend money;
- (4) Father made rules for the mother like “you must only do what I say” and “I am the only one who has a say in this house”; and
- (5) Father called her very demeaning names

[62] This is a very concerning form of family violence.

Conduct toward the Child:

[63] Father’s denials of the mother’s accusations with respect to the child really amounted to mere bald denials. He did not address his appreciation for or skill in parenting young children.

[64] I accept the mother’s evidence that the father’s conduct towards the child left the child on more than one occasion crying and sobbing.

Impact on Mother and Child:

[65] The uncontradicted evidence is that the mother has lost a lot of weight and lost more than half her hair.

[66] Shortly after the arrival in Canada, the child is described as extremely anxious by the doctor.

[67] For recently separating families who have also travelled a long way, these may be naturally explainable symptoms. The father, however, made no comment about these descriptions.

Protections in the other Contracting State:

[68] There is no doubt that Germany, as a well-developed and civilized democratic society, has all of the institutional and legislative protections found in Canada.

[69] Sadly, the culture that the mother and father lived within Germany was a very closed community. Mother's whole life with the father and child was within the community. Mother spent many hours a day by herself primarily in the apartment. Mother's advice was from other Syrian mothers at the English classes or from either of the parents' families. Father had complete control over her in that environment and would continue to have that control if mother returns to Germany. He does not have that control over the mother in Canada.

[70] Father said that mother could have easily spoke to the immigration worker in their community who also apparently handled domestic violence issues. Father also said she could have easily gone to the police, as the police in Germany are different than the police in Syria. I do not find the father credible on this issue. Father denied ever laying a hand on the mother, other than pushing in February of 2019. At no time, despite two years of marital conflict and several interventions by family, did father suggest using an outside, independent resource. Father went to his own father for assistance and then to mother's family and finally to mother's former spiritual advisor in Syria.

[71] In the years of abuse and the negotiations and interventions of both families, there is no mention by any family member or the former teacher that an outside resource or the authorities should be contacted for assistance.

[72] The very nature of this insulated community places both mother and child at grave risk from the father and places them in an intolerable and fearful situation.

Conclusions:

[73] In this case, there is a constellation of factors which cannot be considered in isolation. The factors include: physical and emotional abuse of the mother, emotional abuse of the child, control over the mother and child, isolation of the mother and child, and the unique nature of the isolation of the community.

[74] Based on all of the evidence, I am more than satisfied that there is a grave risk that the child would be exposed to ongoing physiological and psychological harm if returned to Germany. Ongoing abusive conduct by the father towards the mother and the child is more than likely and would place the child in an intolerable situation.

[75] The father's Application is accordingly dismissed.

[76] The court would like to thank counsel and both interpreters for their tremendous assistance in supporting a fair and timely hearing.

Released: June 3, 2020

Signed: Justice D. Paulseth