COURT OF APPEAL FOR ONTARIO

CITATION: Farsi v. Da Rocha, 2020 ONCA 92
DATE: 20200206
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Gillese, Rouleau and Fairburn JJ.A.

BETWEEN

Doriane Laura Farsi

Applicant (Appellant)

and

Pedro Rafael Pereira Da Rocha

Respondent (Respondent)

Steven M. Bookman and Gillian Bookman, for the appellant

Darlene Rites, for the respondent

Heard: January 13, 2020

On appeal from the order of Justice Freya Kristjanson of the Superior Court of Justice, dated September 27, 2019, with reasons reported at 2019 CarswellOnt 16957.

Gillese J.A.:

[1] How is the habitual residence of a child to be determined, for the purpose of an application under the *Convention on the Civil Aspects of International Child Abduction*, Can. T. S. 1983 No. 35 (*Hague Convention*), when the parents assert competing claims of wrongful taking and retention of the child? That question lies at the heart of this appeal.

A. OVERVIEW

[2] The child in question was born in Toronto and raised there by both parents until October 2018, when she was six months old. At that time, her mother took her to France. Four months later, in February 2019, the father travelled to France and brought the child back to Ontario.

[3] The parents have very different versions of the circumstances in which the child was both taken to France and brought back to Ontario. Each says the other wrongfully took the child or wrongfully retained her or both.

[4] The mother brought a *Hague Convention* application in Ontario (the Application) in which she alleged that the child was habitually resident in France in February 2019 and had been wrongfully removed to Canada. She asked the court to order that the child be returned to France.

[5] The application judge dismissed the Application. She found that the child was habitually resident in Canada until October 28, 2018, when the parties' relationship ended. She further found that the child's habitual residence remained Canada, despite her having lived in France with her mother from mid-October 2018 to the end of February 2019. Because the child was not habitually resident in France in February 2019, the provisions of the *Hague Convention* did not apply.

[6] On appeal, the mother contends that the application judge's decision offends the *Hague Convention* and the principles set out by the Supreme Court of Canada in *Office of the Children's Lawyer v. Balev,* 2018 SCC 16, [2018] 1 S.C.R. 398.

[7] For the reasons that follow, I would dismiss the appeal.

B. BACKGROUND IN BRIEF

[8] There were many factual disputes between the parties. In this section, I set out the relevant uncontested background facts and the positions that each party took on the Application. A full appreciation of the factual circumstances can be gained only by reading this section in conjunction with the application judge's detailed factual findings, summarized in the following section.

[9] Doriane Farsi (the appellant) is a French citizen. In January 2017, she was working (on a visa) as a waitress in Toronto when she met Pedro Da Rocha (the respondent). The respondent is a Portuguese citizen and a permanent resident of Canada. He lives in Toronto where he works as a roofer. He has a close relationship with his parents and his sister, all of whom also live in Toronto.

[10] The appellant and respondent began dating in May 2017. From June 2017 to October 2018 they lived together, with the respondent's parents, in the respondent's parents' home in Toronto.

[11] In April 2018, the appellant and respondent had a child, M.D. Having been born in Canada, M.D. is a Canadian citizen. The parties jointly parented M.D. When they were working, the respondent's mother cared for M.D.

[12] In July 2018, the appellant took M.D. to France for a visit to meet her maternal relatives. During this time, the respondent saw M.D. regularly through Facebook Messenger. When the appellant and M.D. returned to Toronto in August 2018, the parties and their child continued to live with the respondent's parents in their home and the paternal grandmother resumed her role as the child's caregiver when the parties were working.

[13] On October 14, 2018, the appellant travelled to France with M.D., where they remained until February 2019.

[14] On February 24, 2019, the respondent travelled to France. On February 28, 2019, he returned to Ontario with M.D. He and M.D. continue to live in Toronto. As before, they reside with his parents in their home and his mother cares for M.D. when he is working. The appellant continues to live in France.

[15] In early May 2019, the appellant started a *Hague Convention* application in France seeking the child's return. The Hague Central Authority in France sent a request for the child's return to the Hague Central Authority in Ontario. When that request was refused, the appellant brought this Application, dated May 27, 2019, seeking the child's return to France.

[16] Two events played a critical role in the Application's determination: what happened in October 2018 when the appellant took the child to France and what happened in February 2019 when the respondent brought the child back to Ontario. The parties' evidence on these two matters diverged dramatically.

(1) The appellant's evidence on the Application

[17] The appellant said she ended her relationship with the respondent when she returned to Toronto from France in August 2018 and that she relocated permanently to France, with the child, on October 14, 2018, with the respondent's full knowledge and consent. Once in France, she and the respondent communicated regularly. He interacted with M.D. by video communication on almost a daily basis. She said that the respondent encouraged her to return to Toronto with M.D. so that they could continue living together as a family and sent her photographs of apartments he proposed to rent so they could move out from his parents' home. She declined to return but encouraged him to travel to France to visit with M.D.

[18] The appellant said that the respondent made no commitment to visit France but arrived on short notice in February 2019 and asked to be allowed to take the child to Canada for a one-month vacation. She agreed and signed a pre-prepared travel consent form that he had brought with him. In her affidavit filed on the

Application, it was alleged that she handwrote on the travel consent form that the child was to be returned to her in France at the end of the one-month vacation.

[19] The appellant said that, at the end of March 2019, the respondent refused to return M.D. to France. So, on April 6, 2019, she and her grandmother went to Toronto for the purpose of picking up M.D. and returning with her to France. While in Toronto, she was served with court documents from which she learned that the respondent was seeking sole custody of M.D. The following day, she met with legal counsel in Toronto. Arrangements were made so she could see M.D., but only after she surrendered her passport.

[20] The appellant returned to France and started a *Hague Convention* application there. The French authorities requested the child's return to France. When the respondent ignored that request, she commenced this Application.

[21] In the Application, the appellant alleged that when the respondent removed the child from France on February 28, 2019, he falsely indicated that he was taking the child for a one-month vacation in Ontario, and that since the one-month period expired in March 28, 2019, the respondent had wrongfully retained the child in Canada.

(2) The respondent's evidence on the Application

[22] The respondent said that the appellant took M.D. to France on October 14, 2018, with his consent, for a two-week visit to sign documentation relating to her grandmother's inheritance.

[23] When the appellant told him in a video chat on October 28, 2018, that she would not return to Canada with the child, he immediately hired a lawyer and started an application under the *Hague Convention* for the return of the child to Canada. Through this application, he sought the assistance of the Hague Central Authority in Ontario and in France in securing M.D.'s return to Ontario. The French authority requested additional documentation about the child's habitual residence, including M.D.'s medical records. He and his lawyer began taking steps to obtain the requested documentation.

[24] The respondent said that from November 2018 to January 2019, the appellant frequently complained about caring for M.D. and told him that he could come to France to pick up M.D. However, the appellant would not confirm a date for M.D.'s return to him. In January 2019, the appellant agreed to return M.D. to his care in Toronto. He flew to France on February 24, 2019 to pick up M.D. The appellant gave him M.D.'s passport and signed a travel consent form, prepared in advance by his lawyer, which allowed M.D. to return to Toronto with him in February or March 2019. He said that the appellant did not handwrite anything on

the travel consent form or indicate that M.D. was to be returned to her in France after one month.

[25] The respondent and M.D. flew back to Canada on February 28, 2019. M.D. has been in his sole care since then. He and M.D. continue to reside with his parents in their home and his mother cares for M.D. when he is working. He and M.D. have a strong and loving relationship with his parents and his sister.

[26] Once back in Toronto with M.D., the respondent instructed his lawyer to advise the Hague Central Authority in Ontario of M.D.'s return. His application was subsequently closed. In early April 2019, the respondent started custody proceedings in Ontario, seeking sole custody of M.D. He did so, in part, because he feared that the appellant would come to Toronto, abduct M.D., and take her to France.

C. THE DECISION BELOW

[27] The application judge made extensive findings of fact, which I summarize below.

- The parties lived together in Toronto from June 2017 to October 2018, with the respondent's parents in the parents' home. M.D. was born in April 2018 and is a Canadian citizen. The appellant took a three-month maternity leave and then returned to work as a waitress. The respondent continued to work full-time as a roofer. The parties jointly

parented M.D. after her birth in April 2018 and jointly exercised the rights of custody. Both shared the responsibilities of caring for M.D., including changing diapers, and bathing, feeding, and playing with her. M.D.'s paternal grandmother assisted with childcare when the parties were working. The relationship between the appellant and the paternal grandmother was strained (paras. 16-17).

- M.D. was a patient of a Toronto health clinic and attended five appointments in her first six months of life. Her six-month well-baby appointment was on October 11, 2018, three days before the appellant relocated to France with her. Nothing in the clinical notes and records suggests that the appellant indicated that she was relocating with M.D. to France. On the contrary, the notes show that the nurse discussed an optional 9-month visit and a 12-month visit, which are consistent with M.D. remaining in Canada (paras. 18-19).

- Before her departure for France in October 2018, the appellant and respondent took steps for her to become a permanent resident in Canada. They met with an immigration consultant in June 2018 and started the spousal sponsorship process so that the appellant could obtain permanent resident status in Canada. They collected letters of support and, in August 2018, the appellant requested and obtained her criminal records from France for the purpose of that process. The

appellant applied for an Ontario driver's licence. The parties also had a joint bank account in Toronto (paras. 20-22).

- The respondent consented to the appellant travelling to France with M.D. in October 2018 for two weeks to deal with legal matters, at which point the appellant and M.D. were to return to Canada (para. 24).

- The appellant did not break up with the respondent in August 2018, as she asserted. Contemporaneous text messages were inconsistent with this assertion. They include: a text from the appellant to the respondent on October 14, 2018, the day she left Toronto, which she signed, "Kiss love"; a text the following day in which she wrote "OK sleep well then kiss love u" to which the respondent replied "I love you too babe"; and various "kiss" texts exchanged by the parties in the period around October 14. Nor is the assertion consistent with the evidence of the parties' search for an apartment to rent in Toronto. The parties were looking at apartments before the appellant left on October 14 so that they could move out from the paternal grandparents' home. The respondent continued the search in the initial period after the appellant left for France. On October 23, 2018, the respondent sent the appellant a text message in which he attached five apartment listings in Toronto (paras. 24-27).

- The parties broke up on October 28, 2018, when the appellant told the respondent that she had no intention of returning with M.D. to Canada. This finding is consistent with the text messages between the parties that follow the October 28 revelation. It is also consistent with the respondent's actions that immediately follow the revelation. In less than a week, he had retained counsel, started a *Hague Convention* application and, through it, requested the assistance of the Hague Central Authority in Ontario and in France to secure M.D.'s return (paras. 28-31, 34).

- There was a "paucity of evidence" about M.D.'s life and circumstances in France from October 2018 to February 2019. In her original affidavit, the appellant does not mention M.D. or her living conditions and ties in France. In her reply affidavit, sworn on September 9, 2019, the appellant states only that M.D. lived with her during that time and that she had been M.D.'s primary caregiver since birth. The application judge noted that she did not accept this evidence as she found that the parties jointly parented M.D. until the appellant failed to return to Canada at the end of October 2018 (para. 33).

- Before the respondent returned to Canada on February 28, 2019, with M.D., the appellant gave him M.D.'s passport and signed a travel consent form that expressly permitted M.D. to travel with him to

Toronto in February or March of 2019. The application judge found that there was no handwriting on the consent form as the appellant had stated in her Application and original affidavit. The application judge noted that the law office representing the appellant took responsibility for this statement, saying that it was a drafting error due to miscommunication. In light of this, the application judge stated that she did not go behind the statement. She found that: the appellant never handwrote on the consent form that M.D. was to be returned to her in France after one month; the consent form allowed the respondent to travel with M.D. to Toronto in either February or March of 2019; and, the consent form did not stipulate a return date to France or make mention of return travel to France (paras. 37-39).

- On March 30, 2019, the respondent informed the appellant that he was seeking a custody order of the child from the Ontario courts (para. 40).
- The appellant and her grandmother came to Canada on April 6, 2019, seeking M.D.’s return to France (para. 40).
- On May 2, 2019, the appellant made an application to the Hague Central Authority in France for a request for the child’s return. France

> sent the request but it was refused. The appellant then started this Application on May 27, 2019 (para. 40).

[28] Based on these findings, the application judge found that: until October 28, 2018, M.D.'s habitual residence was Canada; the appellant had the respondent's consent for a two-week trip to France, not a relocation; between October 28, 2018, and February 28, 2019, M.D. was wrongfully retained in France; both parents were exercising custodial rights at the time that the appellant wrongfully retained M.D. in France; M.D.'s habitual residence did not change in the four months in which she was retained in France; and M.D.'s habitual residence remains Canada (para. 14).

[29] The application judge acknowledged that the Application required her to determine the child's habitual residence on February 28, 2019 (paras. 6 and 42). However, in her view, the hybrid approach in *Balev* required that she examine all relevant factors in the child's circumstances immediately prior to that date, including a factual examination of why M.D. was in France on February 28, 2019 (paras. 11, 49-50).

[30] At para. 52 of the reasons, the application judge held that the appellant's wrongful retention of M.D. in France from the end of October 2018 to the end of February 2019 did not change M.D.'s habitual residence to France, saying:

> Other than the evidence that the child lived with her mother in this period, I have no information about the

> child's ties and circumstances. [The appellant] unilaterally and wrongfully attempted to change M.D.'s residence to France, through a deceptive removal and retention, without the knowledge or valid and informed consent of [the respondent]. Immediately before March 28, 2019, M.D.'s habitual residence was Toronto, and this remained M.D.'s habitual residence in February and March 2019.

[31] As a result, the application judge found that M.D. had not been wrongfully removed from France nor wrongfully retained in Ontario and she dismissed the Application.

D. THE ISSUES

[32] The appellant raises many grounds of appeal. They can be considered under two broad issues. Did the application judge err:

1. by focusing on the wrong time frame and issue?
2. in her determination of the child’s habitual residence?

[33] After considering these broad issues, I address two additional discrete issues that the appellant raised. Did the application judge err:

3. in finding that the appellant returned to full-time employment when the child was three months old? and/or
4. by improperly permitting the respondent to file fresh affidavit evidence late in the process?

E. STANDARD OF REVIEW

[34] Before analyzing the issues, it is important to recall the high bar that *Balev* sets for appellate review: habitual residence determinations are to be deferred to, absent a palpable and overriding error. The Supreme Court explains at para. 38 of *Balev*:

> Under Canadian law, whether habitual residence is viewed as a question of fact or a question of mixed fact and law, appellate courts must defer to the application judge's decision on a child's habitual residence, absent palpable and overriding error. The need for deference may be inferred from the intention of the original states parties and the decision not to define habitual residence in the body of the *Hague Convention*. The goal was to avoid legal technicalities and to adopt a fact-based determination. [Citations omitted.]

[35] A palpable and overriding error is one that is clearly wrong, unreasonable, or not reasonably supported on the evidence: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 110. The Supreme Court recently explained in *Salomon v. Matte-Thompson*, 2019 SCC 14, 432 D.L.R. (4th) 1, at para. 33, "[w]here the deferential standard of palpable and overriding error applies, an appellate court can intervene only if there is an obvious error in the trial decision that is determinative of the outcome of the case."

F. ANALYSIS

(1) Did the application judge err by focusing on the wrong time frame and issue?

[36] The appellant says that the application judge was obliged to determine whether M.D. had been wrongfully removed from France on February 28, 2019, or wrongfully retained in Ontario after March 28, 2019. Instead, the appellant submits, the application judge focused on an issue that she had no jurisdiction to determine: whether M.D. was wrongfully retained in France after the end of October 2018. The appellant says that under the *Hague Convention*, only the Central Authority in France and the French courts had the jurisdiction to make that determination.

[37] I do not accept this submission.

[38] The application judge recognized that her obligation on the Application was to determine whether M.D. had been wrongfully removed from France on February 28, 2019, or wrongfully retained in Ontario after March 28, 2019 (paras. 6, 10 and 42). She also recognized that Article 3 of the *Hague Convention* required that she determine where M.D. was habitually resident “immediately before” February 28, 2019, the date of the alleged wrongful removal (para. 9).

[39] However, the application judge did not accept that, in determining M.D.’s habitual residence on February 28, 2019, she had no jurisdiction to consider the child’s earlier alleged wrongful retention commencing October 28, 2018 (para. 10).

[40] The application judge was of the view that to determine M.D.'s habitual residence at the end of February 2019, she had to examine all the relevant facts in the child's circumstances leading up to that date, including the alleged earlier wrongful retention.

[41] I agree with the application judge that, in determining M.D.'s habitual residence "immediately before" the alleged wrongful removal on February 28, 2019, the hybrid approach in *Balev* required that she look at the "entirety" of M.D.'s situation, "unencumbered by rigid rules, formulas, or presumptions": *Balev,* at para. 47. In this case, the entirety of M.D.'s situation includes her habitual residence on October 28, 2018, and the circumstances under which she remained in France after that date.

[42] Accordingly, in my view, the application judge made no error in deciding where M.D. was habitually resident on October 28, 2018, and her consideration of the circumstances in which the child remained in France for the ensuing four months. In so doing, the application judge was not deciding the wrong issue and time frame. Rather, her decision on those matters were some of the considerations that informed her determination of the issue before her – whether M.D. was habitually resident in France on February 28, 2019, the date on which the respondent brought M.D. back to Canada.

(2) Did the application judge err in her determination of the child's habitual residence?

[43] The appellant submits that, in determining that the child's habitual residence on February 28, 2019 remained Canada, the application judge erred in her application of the principles in *Balev* by:

(i) improperly relying on the principle that one parent cannot unilaterally change a child's habitual residence;

(ii) adopting the parental intention approach which *Balev* largely overruled;

(iii) failing to recognize that the infant child's habitual residence was tied to that of the appellant, her primary caregiver; and

(iv) failing to examine the focal point of the child's life just prior to the wrongful removal (February 28, 2019) or wrongful retention (March 28, 2019).

[44] In my view, the application judge made none of the alleged errors.

(i) A unilateral change to a child's habitual residence

[45] The appellant argues that the application judge failed to recognize that *Balev* says that one parent can unilaterally change a child's habitual residence. I disagree.

[46] At para. 12 of her reasons, the application judge sets out six points from *Balev* which are to guide the courts in assessing habitual residence. The fifth point is that "the actions of one parent may unilaterally change the habitual residence of a child". She cites to para. 46 of *Balev* for this point.

[47] In para. 46 of *Balev*, a majority of the Supreme Court states that there is no rule that the actions of one parent cannot unilaterally change the habitual residence of a child. It explains that imposing such a legal construct onto the habitual residence determination detracts from the task of the finder of fact to evaluate all the relevant circumstances in determining where the child was habitually resident at the date of wrongful removal or retention.

[48] In any event, the application judge's finding that M.D.'s habitual residence, on February 28, 2019, remained Canada was not based on a misguided understanding of the role that one parent's unilateral actions might play, as the appellant submits. As the application judge explains at para. 52 of her reasons, it was the lack of information about M.D.'s life, ties and circumstances in the period from October 2018 to February 2019 that led her to find that M.D.'s habitual residence did not change from Canada.

(ii) The role of parental intention

[49] Relying on para. 45 of *Balev*, at para. 12 of her reasons, the application judge says this about parental intention:

> (d) the circumstances of the parents, including their intentions, may be important particularly in the case of young children, but parental intention is an indicator to be considered in the context of the entire body of evidence and specific factual circumstances in each case[.]

[50] At para. 13 of her reasons, the application judge adds that parental intention is a relevant consideration under the *Balev* framework, "as is the purpose, nature and duration of consent to travel to and remain in a country".

[51] In analyzing M.D.'s habitual residence, the application judge took into account parental consent in accordance with these propositions from *Balev*. She found that the respondent did not consent to the appellant relocating with M.D. to France – he consented to M.D. being in France with the appellant for the two- week period from October 14 to October 28, 2018. Consequently, the application judge found, when the two-week period expired at the end of October 2018, the appellant wrongfully retained M.D. in France.

[52] The application judge made no palpable and overriding error in these findings. Nor did she place undue weight on the fact of the wrongful retention when determining whether M.D. was habitually resident in France as of February 28, 2019. The application judge acknowledged that M.D. had been living in France for four months, with the appellant, before the respondent took her back to Ontario. However, as I have noted, there was a paucity of evidence on M.D.'s circumstances and ties in the four-month period.

(iii) Primary caregiver and its relation to the child's habitual residence

[53] At para. 51 of the reasons, the application judge rejected the appellant's argument that she was obliged to find that, on February 28, 2019, M.D.'s habitual residence was France because for an infant, the focal point of the infant's life is who looked after her and in the four-month period leading up to February 28, that was the appellant. In the circumstances of this case, this was not a palpable and overriding error.

[54] The focal point of a child's life is based on "the family and social environment in which its life has developed": *Balev,* at para. 43. M.D. was born in Canada. Up until October 28, 2018, she enjoyed the care of both of her parents. She had a close relationship with her paternal grandparents, who cared for her when the parents could not. M.D. also had a primary care physician in Toronto, with whom she had regular appointments.

[55] There was no similar evidence about M.D.'s life, ties and circumstances in the four-month period between October 2018 and February 2019. The only evidence the appellant provided on these matters was the bald statement that M.D. lived with her during that time. She gave no evidence about where she and M.D. were living or with whom, where the appellant was working (if she was working at all), or whether M.D. was involved with the appellant's extended family. The only evidence on the last point came from the respondent's affidavit in which he set out

his limited understanding that the maternal grandmother may have been involved in M.D.'s care.

[56] Given the paucity of evidence about M.D.'s circumstances in the relevant period, the application judge was unable to conclude that M.D.'s habitual residence had changed to France. I see no palpable and overriding error in the application judge's conclusion.

(iv) The focal point of the child's life on February 28, 2019

[57] For the reasons already given, I see no palpable and overriding error in the application judge's finding in respect of the focal point of M.D.'s life immediately before the alleged wrongful removal on February 28, 2019. She properly articulated the legal principles that govern this matter (see paras. 12, 49-52). She found that as of October 28, 2018, M.D.'s habitual residence was Canada. The paucity of evidence on M.D.'s ties and circumstances in France between then and February 28, 2019, led the application judge to find that M.D.'s habitual residence had not changed.

(3) Did the application judge err in finding that the appellant returned to full-time employment when the child was three months old?

[58] The appellant's evidence was that she returned to work in September 2018 when M.D. was five months old. The respondent's evidence was that the appellant took three months of maternity leave and returned to work.

[59] The application judge found that the appellant returned to full-time employment when M.D. was three months old (the first finding). She also found that the appellant vacationed in France, with M.D., from July 14 to August 24, 2018 (the second finding). At that time, the appellant says, M.D. was three months old.

[60] The appellant submits that the first finding is inconsistent with the second and must be the result of a palpable and overriding error. How could M.D. both be three months old when the appellant returned to work and three months old when she was away with M.D. on vacation in France? She also submits that the application judge made the first finding because she accepted the respondent's evidence as credible.

[61] I do not accept either submission.

[62] I do not accept that the application judge made a palpable and overriding error in making the first finding. As I explain above, a palpable and overriding error is one that is clearly wrong, unreasonable, or not reasonably supported on the evidence. The first finding is none of those things. However, even if the application judge did make such an error, it does not rise to the level required for appellate intervention, namely, that the error was "determinative of the outcome of the case". This was but one of a host of considerations that went into the application judge's determination of M.D.'s habitual residence. As I explain above, this court cannot intervene unless there is an obvious error that is determinative of the outcome.

[63] I also reject the appellant's second submission on this ground of appeal: that the application judge accepted the respondent's evidence simply because she found the respondent credible. Respectfully, this fundamentally misstates the way in which the application judge approached the task of making findings of fact.

[64] On every key issue, the application judge set out the main conflicts in the evidence of the parties. She then gave careful, detailed reasons explaining her finding on the issue and why she made it. Importantly, the application judge thoroughly canvassed all the evidence on each such issue, including the independent evidence of third parties and contemporary documentation. Her findings are solidly grounded in the totality of evidence before her.

[65] One example is sufficient to demonstrate that this was the application judge's approach to fact finding. The appellant said that she ended her relationship with the respondent in August 2018 when she returned to Toronto from vacationing in France. The respondent said that their relationship ended on October 28, 2018, when the appellant told him that she was staying in France with M.D. and not returning to Toronto.

[66] The application judge set out the competing versions of when the parties' relationship ended. She then examined what happened in August 2018 after the appellant returned to Toronto. She referred to the independent evidence verifying the steps that the parties took in that period for the appellant to become a

permanent resident of Canada and their search for apartments to rent. She also considered M.D.'s medical records, which showed no evidence that the appellant was going to relocate to France. The application judge also looked at the luggage that the appellant took with her when she left on October 14, a matter discussed more fully below. Further, she considered the text messages that the parties exchanged between October 14 and 28, 2018 – contemporaneous documentary evidence. Finally, she considered the evidence of what transpired after October 28, including the text messages exchanged between the two parties and the timing of the respondent's *Hague Convention* application. Only after considering and weighing all of that evidence, did the application judge come to the conclusion that the parties' relationship ended on October 28, 2018.

[67] In the result, it is correct to say that the application judge largely accepted the respondent's version of events – but it is not correct to say that she did so simply because she found him credible. As the application judge explains at para. 41 of the reasons, she preferred the respondent's evidence on the key issues because the appellant's evidence suffered from numerous inconsistencies and significant critical omissions. It was also contradicted by contemporaneous documents and other independent evidence.

[68] In my view, the application judge's approach to fact finding was exemplary. I see nothing in this ground of appeal.

(4) Did the application judge err by improperly permitting the respondent to file fresh evidence late in the process?

[69] The respondent late filed an affidavit sworn by his sister on September 13, 2019 (the sister's affidavit). In it, the sister swore that the appellant took with her two suitcases, a stroller and a diaper bag when she travelled to France with M.D. in October 2018. As can be seen from para. 32 of the reasons, the application judge relied on the sister's affidavit:

> I find that [the appellant] took two suitcases, a stroller and a diaper bag – not suspicious for travel with a six-month old, not the four suitcases [the appellant] alleges in her reply affidavit, given the evidence of [the respondent's] sister, which I accept.

[70] The appellant says that she was served with the sister's affidavit on the morning of September 16, 2019, only minutes before the hearing of the Application began and that she was prejudiced because she had no opportunity to reply to it.

[71] I do not accept this submission.

[72] The appellant received the sister's affidavit on September 13, 2019 (the day on which it was sworn), not on September 16, 2019. Counsel for the appellant acknowledged receipt of the sister's affidavit in a fax to counsel for the respondent on September 13, 2019, at 2:27 p.m. Had the appellant wished to do so, a responding affidavit could have been prepared.

[73] In any event, if the appellant felt that she had not had sufficient time to respond to the sister's affidavit, she could have sought a short adjournment for that purpose. On the record, she made no such request.

[74] Further, the application judge gave compelling reasons for admitting the sister's affidavit. At para. 57, she explains that she admitted the sister's affidavit because it provided clarity on a material issue – the luggage the appellant took when she travelled to France in October 2018. She also explains that the sister's affidavit was tendered in response to the appellant's reply affidavit in which, for the first time, the appellant swore that when the respondent took her to the airport on October 14, she took with her four suitcases that contained all of her possessions and those of M.D.

[75] In the circumstances, the application judge made no error in admitting the sister's affidavit.

G. DISPOSITION

[76] For these reasons, I would dismiss the appeal with costs to the respondent fixed at $13,400, all inclusive.

Released: February 6, 2020 ("E.E.G.")

"E.E. Gillese J.A."
"I agree. Paul Rouleau J.A."
"I agree. Fairburn J.A."