COURT OF APPEAL FOR ONTARIO

CITATION: L[redacted] v. R[redacted], 2022 ONCA 582
DATE: 20220812
DOCKET: C69896

Benotto, Zarnett and Thorburn JJ.A.

BETWEEN

[redacted] L[redacted]

Applicant (Appellant)

and

[redacted] R[redacted]

Respondent (Respondent)

[redacted] L[redacted], acting in person

Alice Van Deven, for the respondent

Heard: July 12, 2022

On appeal from the order of Justice Denise M. Korpan of the Superior Court of Justice, dated June 21, 2021, with reasons reported at 2021 ONSC 3466.

Benotto J.A.:

[1] Canada is a signatory to the *Hague Convention on the Civil Aspects of Child Abduction*, Can. T.S. 1983 No. 35 ("*Hague Convention*"). The *Hague Convention* is incorporated into Ontario law through s.46(2) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (*CLRA*). The *Hague Convention* has two goals: (a) to secure, subject to very limited exceptions, the prompt return of children wrongfully removed

from or retained in any contracting state; and (b) to ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting states.

[2] Courts have a duty to resolve applications quickly and efficiently for the return of a child under the *Hague Convention*. Delay imposes hardship on the child, frustrates appellate review, and breaches our international obligations. To achieve prompt resolution, the court must strictly manage the process, control the evidence and the timelines, and recognize that custody and access orders (now called "parenting orders" under Canadian and Ontario law) are for another day.

[3] The appellant is the father of a nine-year-old boy who had lived his entire life in Peru until 2019 when the respondent mother wrongfully removed him to Canada. Not only did the father have shared custody rights, but the mother took the child out of the country in violation of a Peruvian court order. The father promptly applied to the Ontario court for the child's return pursuant to the *Hague Convention*. The court's determination came more than one-and-a-half years after the abduction. The application judge confirmed that the child's habitual residence was Peru and that he had been wrongfully removed. However, she dismissed the father's application to return the child based on the *Convention's* exception to mandatory return. Article 13(b) provides that the return of the child need not be ordered if it is established that "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."

[4] The application judge made this determination following a 33-day hearing which examined the mother's allegations against the father starting from 2014 (the year of separation), through 2019 (when she left Peru), to the time of the hearing. At no point in her analysis did the application judge rationalize her conclusion with the findings made by the family court in Peru, upheld by the Superior Court of Piura Second Civil Court of Appeals. Those findings, which arose from a review of conduct over much of the same period, granted "joint temporary custody", stated that it was in the child's best interest to have extensive time with the father, found that both parties were engaged in extensive conflict with each other, that there had been violence and restraining orders "on both sides", and that several matters were still before the court.

[5] As I will explain, because of the delay, this court is now limited in its remedies. It has been more than two-and-a-half years since the abduction, and it is simply too late to return the child, who is now estranged from the father. The only available remedy at this point is a direction to the court below to move quickly to a resolution of a parenting plan with a fresh approach to the evidence.

BACKGROUND

[6] The parties were married in 2012. Their son was born in [redacted] 2013. They separated when he was a baby. High conflict litigation ensued with allegations of abuse on both sides. Despite these allegations and cross-allegations of abuse, in August 2018 the family court in Peru made an award of temporary joint custody. This order was upheld on appeal in April 2019.

[7] The mother then made further allegations of threats and violence by the father and fled to Ecuador with the child on October 22, 2019. They arrived in Canada on November 3, 2019 and claimed asylum. The mother and child now live in London, Ontario with her new partner, who travelled from Peru. The father moved to London in July 2020. Due to the COVID-19 pandemic, this was as soon as he was allowed entry to the country.

The Hague application

[8] On March 4, 2020, the father filed his application under the *Hague Convention*. The hearing began on September 21, 2020 and continued for 33 non-consecutive days until February 2, 2021. The application judge delivered reasons for decision on June 21, 2021.

Decision Below

[9] The application judge found that the child's habitual residence was Peru: he was born there and, up until his removal, had lived there his whole life. The child was wrongfully removed from Peru, pursuant to art. 3 of the *Hague Convention*, because the appellant had custody rights which he was exercising at the time of removal.

[10] However, the application judge concluded that there was a grave risk that the child's return to Peru would expose him to physical or psychological harm or otherwise place him in an intolerable situation: *Hague Convention*, art. 13(b).

[11] The application judge found that, other than an instance of yanking the child's arm, the father had never harmed the child. However, she concluded that the grave risk of harm exception was engaged based on the "serial and ongoing compilation of the father's actions over a period of approximately six years": at para. 293.

[12] The application judge also found that "the [appellant] has engaged in a pattern of domestic violence against the mother, that has escalated to death threats in August 2019, which threats for the first time, now include the child": at para. 279. She accepted that the respondent does not feel safe in Peru due to the

appellant's conduct and concluded that the mother was not adequately protected by the legal system in Peru.

Ontario court application for custody

[13] As a result of the application judge's decision, Ontario is now exercising jurisdiction to conduct an application by the mother for a parenting order.

[14] We were told in oral submissions that there is a restraining order against the father and that he has no visitation rights. It appears the child is alienated from him.

[15] The father appeals the application judge's decision not to return the child to Peru. The father represented himself on the appeal. The mother was represented by counsel.

ISSUES ON APPEAL

[16] The father takes issue with most aspects of the decision below. In my view, the decision below gives rise to three main issues on appeal:

1. Delay resulting from the process followed by the application judge;
2. Gaps in the application judge's analysis relevant to the parenting case before the Ontario court; and
3. The appropriate remedy.

ANALYSIS

[17] This has been a high conflict dispute from the time the parents separated. The courts in Peru were actively involved with the family when the mother fled with the child. What is meant to be a prompt six-week determination under the *Hague Convention* took 68 weeks. This court is now impeded in its review function. In addition to the delay, there are the gaps in the application judge's analysis which might affect the ongoing parenting action. I will discuss each issue below.

(1) The process led to delay

[18] Article 11 of the *Hague Convention* requires Canada to "act expeditiously in proceedings for the return of children."

[19] The importance of this principle was definitively stated in *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, at para. 23:

> The harms the *Hague Convention* seeks to remedy are evident. International child abductions have serious consequences for the children abducted and the parents left behind. The children are removed from their home environments and often from contact with the other parents. They may be transplanted into a culture with which they have no prior ties, with different social structures, school systems, and sometimes languages. Dueling custody battles waged in different countries may follow, delaying resolution of custody issues. None of this is good for children or parents.

[20] Prompt return protects against the harmful effects of wrongful removal or retention, deters parents from abducting the child in the hope that they will be able

to establish links in a new country that might ultimately award them custody, and provides for a speedy adjudication of the merits of a custody or access dispute in the forum of a child's habitual residence, which eliminates disputes about the proper forum for resolution of custody and access issues: *Balev*, at paras. 25-27.

[21] Although the application judge referred to *Balev*, the conduct of the application and hearing did not comply with this directive. I will demonstrate this for each stage.

(a) From application to hearing

[22] The father filed his application on March 4, 2020. The hearing began on September 21, 2020. The standard for adjudication is six weeks from application to determination. After six weeks has passed, the applicant or the requesting state can ask for an explanation of the delay: *Hague Convention*, art. 11.[1]

[23] Here, there was a six-and-a-half-month delay in a case that must be prioritized as urgent.

[1] Effective October 3, 2022, r. 37.2 of the *Family Law Rules* now also provide that all international child abduction matters – whether or not covered by the *Hague Convention* - must have a first meeting with a judge within seven days of the start of the case and must be resolved promptly and within six weeks if a *Hague Convention* case. While not in effect at the time of this application, the rule reflects the urgency required under the *Hague Convention* and confirmed by *Balev*.

(b) The hearing

[24] A hearing under the *Hague Convention* is not a custody hearing. It is aimed at "enforcing custody rights and securing the prompt return of wrongfully removed or retained children to their country of habitual residence": *Balev*, at para. 24; *Hague Convention*, art. 1. It is meant to restore the *status quo* that existed before the wrongful removal or retention. Its purpose is to return the child to the jurisdiction that is most appropriate for the determination of custody and access: *Balev*, at para. 24.

[25] Article 13(b) of the *Convention* sets out a *narrow* exception to the mandatory return of a wrongfully abducted child. The parent opposing return must establish "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." This grave risk analysis is not meant to become an in-depth analysis of the parties' history. Nor is it a re-do of extensive court proceedings in the foreign state.

[26] To conclude that the mother had established grave risk, the application judge conducted a year-by-year analysis of the mother's allegations, seemingly delving into every issue and allegation the parties made from the date of their separation and reciting allegations and counter-allegations at length. Parents, friends, family members, former lawyers, and others gave protracted evidence. Since translators and interpreters were required, this approach exponentially

augmented delay. This is not the mandated approach from *Balev*, as outlined in para. 89:

> Judges seized of *Hague Convention* applications should not hesitate to use their authority to expedite proceedings in the interest of the children involved. Unlike much litigation in Canada, *Hague Convention* proceedings should be judge-led, not party-driven, to ensure they are determined expeditiously. [Emphasis added.]

[27] Paragraph 59 of the application judge's reasons acknowledge the troubling delay and explain that "there were delays caused by COVID health concerns, technical issues (including issues with Zoom both in and out of the courtroom) and issues with the availability of witnesses and interpreters". None of those issues can justify the extent of the delay. Rather, the expansive nature of the hearing which detailed events over a six-year period led to inevitable delay. An allegation that the art. 13(b) exception applies does not cancel the court's obligation under the *Convention* for prompt resolution. Since the hearing days were not consecutive, the hearing extended for a period of five months. The total time elapsed from March 2019, when the father filed his application, to the release of the decision was well over a year.

[28] The *Family Law Rules*, O. Reg. 114/99 provide application judges with the necessary management tools to conduct the application quickly. A hearing under the *Hague Convention* must be a focused analysis of the requirements for return and any possible exceptions.

[29] In this case, there was a Peruvian court decision in April 2019 (summarized in para. 43 below) that was inconsistent with the existence of grave risk to the child, at least up to that point in time. The application judge should have addressed – up front - the basis for the extensive re-litigation subsequently embarked upon. The exercise of this case management function would have served two purposes: (i) directions could have been given to focus the hearing; and (ii) the basis for the re-litigation would have been clear. As it stands, there is no basis suggested in the reasons for permitting such re-litigation (see paras. 45 to 46 below).

(c) Release of the application judge's reasons for decision

[30] The hearing concluded on February 17, 2021. The reasons of the application judge were released on June 21, 2021, four months later and one and a half years after the child's arrival in Canada.

(d) Effect of the delay

[31] When, as here, there is a delay, the abducting parent gains an advantage. Not only does the child develop ties to the new jurisdiction, but appellate review is impeded. The child will soon have been in Canada for nearly three years – this is a third of his life. He is now estranged from his father. [2]

[2] There was a 9-month delay from the filing of the notice of appeal in October 2021 to the hearing in July 2022. (The appeal had been dismissed for delay in January 2022 and reinstated in March 2022.)

[32] The standard of review for *Hague Convention* decisions was set out by this court in *Hammerschmidt v. Hammerschmidt*, 2013 ONCA 227, [2013] W.D.F.L. 3318, at para. 5:

> An appeal to this court in a Hague Convention [sic] is not a rehearing or a trial *de novo* review of the evidence, and the application judge's findings are entitled to considerable deference. They will not be interfered with – notwithstanding the hearing is based on affidavit, not *viva voce,* evidence – unless they are unreasonable in the sense that they amount to "palpable and overriding error" or "manifest error" or "clear error".

[33] While the credibility findings are entitled to deference, the process followed here is not in accordance with the court's obligation under the *Convention* for prompt resolution. The application judge has responsibility to comply with the timeline requirements in the *Convention*; see *Balev*, at paras. 84, 87. The delay not only contravenes the court's obligation, it precludes meaningful appellate intervention. The delay itself amounts to a manifest or clear error.

[34] However, this court does not have the ability to remedy the delay. A new hearing would only further the delay and, in light of the current situation, a return order would not appear to be in the child's best interests.

[35] The parenting issue is now before the Ontario court. It is to that action that I now turn.

(2) Gaps in the application judge's analysis relevant to the parenting case before the Ontario court

[36] The father complains about the application judge's factual findings, asserting that the mother has simply lied to the court. Given the standard of review that applies to credibility findings, none of the asserted errors rises to the level of reversible error.

[37] The application judge's findings may become relevant to the parenting orders still to be made. In my view, it is therefore important to comment on some of those findings.

[38] Article 16 of the *Convention* states that courts of the requested state shall not decide on the merits of custody until there is a determination that the child is not to be sent back. That is where the family is now. The parenting of the child remains to be determined.

[39] The British Columbia Court of Appeal has said that a determination of grave risk is a relevant consideration in the subsequent proceeding regarding the child: *Hughes v. Hughes*, 2014 BCCA 196, 355 B.C.A.C. 289, at para. 96. However, in this case, I have significant concerns about the application judge's analysis. In the result, I am of the view that the merits of the parenting proceeding should be considered with a fresh approach. I say this because of the gaps in the application judge's analysis.

[40] There are two gaps in the application judge's analysis: (i) the failure to rationalize her conclusions with those of the Peruvian courts; and (ii) the recitation of the mother's evidence as fact.

(a) Failure to rationalize the conclusions with the findings of the Peruvian court

[41] Although the application judge referred to the "dizzying array" of litigation in Peru, she did not directly engage with that court's different findings about events that occurred during some of the same period that she was considering.

[42] The application judge itemized the court process in Peru to establish that the father did in fact, contrary to the mother's position, have custody rights in Peru. She also included the orders as part of the narrative of events from the date of the separation. But there is detail in the Peruvian court orders that significantly differs from the conclusions reached by the application judge that was not addressed.

[43] The Superior Court of Piura Second Civil Court of Appeals decision dated April 17, 2019, carefully reviewed the extensive involvement of the lower court and upheld the existing orders.[3] In particular, the court:

[3] Two orders were revoked. One dealt with the transfer of the child during visitation because it could not be enforced. The other cancelled an order for certified copies of the proceedings to go to the Prosecutor.

- Upheld the initial joint custody order, made based on the agreement of the parties, which had the child living with the mother and having extensive access to the father;
- Confirmed the importance of the father's relationship with the child;
- Referred to the fact that the mother had been repeatedly in violation of court orders and had received multiple warnings;
- Found the mother's allegations to be unsubstantiated;
- Made no mention of violence on the part of the father, but commented that there had been "violence on both sides";
- Confirmed that the various restraining orders (called "protective measures") do not imply that abuse was committed and do not suspend the father's rights;
- Expressly stated, that "it is also determined that the…father shows no signs of altered mental status that may pose risks for the [child] and the [child] wants his father to visit him";
- Stated that the mother's claim that the father's wish to extend visitation with the child to harm her "is based on subjective matters and cannot set aside the results of the social inquiry and psychological reports filed, nor can it void the validity to enforce an order that has been issued by a higher court"; and
- Ordered that the mother not leave the country without the father's consent.

[44] While the application judge was not bound to treat these findings as determinative of the situation as it existed at the time of the hearing before her, the failure to address the discrepancies between her findings and those of the Peruvian family courts causes concern. The courts in Peru had the benefit of contemporaneous social work reports and psychological assessments. This should have been addressed.

[45] Also concerning is the absence of explanation as to why the application judge concludes that the courts in Peru are not capable of determining the child-related issues. All signatories to the *Hague Convention* are presumed to make decisions based on the child's best interest. As Laskin J.A. said in *Ojeikere v. Ojeikere*, 2018 ONCA 372, 140 O.R. (3d) 561, at para. 60:

> … [U]nder the preamble to the *Convention* all signatories accept and are "firmly convinced that the interests of children are of paramount importance in matters related to their custody". Signatories have accepted this principle and its enforcement by their agreement to adhere to their reciprocal obligations under the *Convention.* In *Hague Convention* cases Ontario courts can have confidence that whatever jurisdiction decides on a child's custody it will do so on the basis of the child's best interests.

[46] What is clear from the evidence in this case is that the child lived in the midst of high conflict between the parents, and both parents played a role in this. The courts in Peru recognized this and were actively involved in resolving the custody and access disputes between the parties. There were several ongoing court files, and the parents and child had undergone psychological assessments as part of

the litigation. Despite this factual background, the application judge's reasons fail to adequately explain why Peru could not be entrusted to determine the custody and access issues.

(b) Accepting the mother's evidence as fact

[47] Credibility findings of an application judge are entitled to deference. At the same time, in the context of the procedural issues and the gaps referred to above, I am troubled by the application judge's description of the mother's evidence, which she seemingly adopts as fact.

[48] Although the application judge states generally that she prefers the mother's evidence, in going through the individual altercations over multiple years, she repeatedly sets out only the mother's evidence and then adopts it as fact. She adopts the same approach when dealing with the mother's allegation of a "death threat", a fact that loomed large in her analysis. At para. 241 of the reasons, the application judge says:

> In August 2019, the father made a death threat against the mother and the child. The mother's evidence is that, although the father had previously threatened her with death, he for the first time, also included the child in the death threat. The mother testified that the father was capable of carrying out his threat, that he owned a gun, and that she no longer felt safe in Peru. The father called her at home from his cell phone and from pay phones to threaten her, the child, and Javier [the mother's boyfriend]. The father was out of control and called repeatedly to speak with the child, who refused to speak to him. He insulted Javier and said things such as, "you

> and my child are dead before he grows up with a stepfather." The father circled around her residence, patrolling it. The mother has witnesses who warned her that the father made similar threats to them, but they are afraid of being identified for fear of being harmed.

[49] It is unclear whether the father testified about this allegation. If he did, there is no explanation as to why his evidence was either rejected or covered by the application judge's blanket statement that she preferred the mother's evidence over the father's. It was clearly in the mother's interest in the circumstances to embellish or exaggerate for the purpose of keeping the father out of her and her son's life. Before making such a significant finding of fact (the only one that gave rise to a direct concern for the child's safety and that occurred in the period following the latest Peruvian court decision), it would have been far better to clearly articulate the father's position and evidence in relation to this particular incident.

Remedy

[50] The application judge's credibility findings do not amount to a reversible error. However, the difficulties I have articulated with respect to the process followed here and the application judge's analysis require that the court approach the ongoing parenting application afresh.

[51] The ongoing parenting application under the *CLRA* appears mired in procedural problems, most likely contributed to by the fact that the father is self-represented. Several different judges have been involved in the matter. The

application would benefit from case management by a single judge, an up-to-date assessment, and the involvement of the Children's Lawyer.

[52] I urge the father to seek legal advice to address the ongoing proceeding under the *CLRA.*

DISPOSITION

[53] I would dismiss the appeal.

[54] I would order an expedited assessment pursuant to s. 30 of the *CLRA* and the appointment of the Children's Lawyer. I would respectfully request that the Regional Senior Justice appoint a single judge other than the application judge to case manage the ongoing proceeding and remain seized.

[55] The father is not seeking costs of the appeal. If the mother seeks costs, I would require counsel to provide written submissions, of not more than two pages, within two weeks of the release of this decision. The father may respond by a submission of a similar length, within two weeks of receipt of the mother's submissions.

Released: August 12, 2022 "M.L.B"

"M.L. Benotto J.A."
"I agree B. Zarnett J.A."
"I agree J.A. Thorburn J.A."