DATE: 2014·05·02
Brampton Registry No. 344/14
CITATION: *Aza v. Zagroudnitski*, 2014 ONCJ 293

ONTARIO COURT OF JUSTICE

B E T W E E N :

NINA AZA,
Applicant

— AND —

ALEXANDRE ZAGROUDNITSKI,
Respondent

Before Justice Lise S. Parent
Heard on 24 April 2014
Reasons for Judgment released on 2 May 2014

Patrick T. McCool ..... counsel for the applicant
Victor Pilnitz ..... counsel for the respondent

JUSTICE L.S. PARENT:—

1: NATURE OF THE PROCEEDING

[1] This is an application pursuant to the *Convention on Civil Aspects of International Child Abduction*, [1983] Can. T.S. No. 35, 1343 U.N.T.S. 89, 99 U.S.T. 11, 19 I.L.M. 1501 ("Hague Convention"), reproduced in the Schedule to section 46 of the *Children's Law Reform Act*, R.S.O. 1990, c. C-12, as amended ("CLRA").

2: POSITION OF THE PARTIES

[2] The applicant/mother ("the mother") has brought an application for a declaration that the child, K. Z-A., born on 29 August 2007, was wrongfully removed from France by the respondent/father ("the father") and is currently being wrongfully detained by him in Ontario.

[3] The mother seeks an order that the child be immediately returned to her care in France.

[4] The father opposes the mother's claim. His position is that that there would be a grave risk of physical or psychological harm to K. Z-A. if this court ordered her return to France. He asks the court to dismiss the mother's application and assume jurisdiction over the parenting issues in this matter.

[5] This hearing proceeded by way of argument based on affidavit evidence, which included exhibits totalling over 200 pages, filed on behalf of the parties. Both parties were represented by counsel.

3: BACKGROUND

[6] The parties were both born in Ukraine and met in Ukraine in 1996.

[7] The father became a French citizen in July of 1998.

[8] The parties married, in France, on 27 May 2000. The father sponsored the mother to France following their marriage. The mother has been a resident of France since that time. The parties have one child, K. Z-A., born on 29 August 2007 in Ukraine.

[9] Throughout their relationship, the parties resided in France and in the Ukraine.

[10] The parties' permanent and final separation occurred on 17 January 2012. The parties and the child were residing in France at the time.

[11] The evidence filed by the mother indicates she left the matrimonial home due to domestic violence. This is disputed by the father.

[12] The father alleges that he discovered the mother having an affair. Following this discovery, the mother left the matrimonial home leaving the child in his care. The mother acknowledges, in her materials, that she left the child in the care of the father, due to her not having a residence and not wanting to disrupt the child's schooling.

[13] On 13 February 2012, the mother filed a divorce application in France. On 25 May 2012, Mr. Justice Poitrineau, Juge aux affaires Familiales du Tribunal de Grande Instance de Bonneville, granted a temporary order awarding K. Z-A.'s primary residence to the mother and access to the father.

[14] The father did not return the child to the mother's care following an access visit during the weekend of 23 to 25 February 2012. The mother's evidence is that she received a text message from the father advising her that he was in the Ukraine with the child and was not returning to France.

[15] The father's evidence is that he left France for the Ukraine with the child on 23 February 2013 in order to protect the child. The father's further evidence is that

he arrived in Canada with K. Z-A. on 23 October 2013.

[16] On 24 January 2014, the mother obtained an order from the Tribunal de Grande Instance de Bonneville which granted the following order:

(a) a divorce;

(b) recognition that the child, K. Z-A.'s, habitual residence is in France;

(c) recognition that the father was illegally withholding the child in contravention of the mother's custodial rights;

(d) the child's primary residence with the mother;

(e) parental authority over the child as the exclusive right of the mother; and

(f) that the father's access and residential rights were suspended.

[17] Upon his arrival to Canada, the father made a refuge claim on behalf of himself and the child. He subsequently withdrew the claim. At the time of this hearing, the father had submitted a request to allow the re-submission of his claim.

[18] At the beginning of this hearing, counsel indicated that there was a consent recognizing that France was the habitual residence of the child K. Z-A.

4: LEGISLATIVE FRAMEWORK

[19] There is no dispute between counsel that Canada and France are contracting states to the Hague Convention and therefore the Convention is the applicable legislative framework.

[20] The relevant articles of the Convention are as follows:

- Article 1 provides that the objects of the Convention are:

  (*a*) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

  (*b*) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

- Article 1 has been interpreted to mean that:

  The Convention's underlying rationale is that disputes over custody of a child should be resolved by the courts in the jurisdiction where the child is habitually resident; child abduction is to be deterred. The Convention presumes that the interests of children who have been wrongfully removed are ordinarily better served by immediately returning them to the place of their habitual residence where the question of their custody should have been determined before their removal.

  See *David Paul M. v. Sue-Ann D.*, 2008 ONCJ 798, 193 A.C.W.S. (3d) 1226, [2008] O.J. No. 4539, 2008 CarswellOnt 9574 (Ont. C.J.); *Jackson v. Graczyk*, 2007 ONCA 388, 86 O.R. (3d) 183, 283 D.L.R. (4th) 755, [2007] O.J. No. 2035, 2007 CarswellOnt 3216 (Ont. C.A.); *V.W. v. D.S.*,

[1996] 2 S.C.R. 108, 196 N.R. 241, 134 D.L.R. (4th) 481, [1996] R.D.F. 205, 19 R.F.L. (4th) 341, 1996 CanLII 192, [1996] S.C.J. No. 53, 1996 CarswellQue 370.

- Article 3 of the Convention provides:

> The removal or the retention of a child is to be considered wrongful where:
>
> (*a*) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (*b*) at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (*a*) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

5: ANALYSIS

5.1: Question 1: Should the Re-submission of the Father's Refugee Claim Stay the Determination of the Hague Convention Application?

[21] Counsel for the father submits that the Hague Application should not be determined until there is a determination of the father and the child's refugee claim. Counsel submits that the determination of this claim is relevant given the reasons raised by the father in his claim namely the need for protection should he and the child return to France, supporting his request to stay in Canada.

[22] Counsel for the mother relies on the decisions of *Kovacs v. Kovacs*, 2002 CanLII 49485, 59 O.R. (3d) 671, 212 D.L.R. (4th) 711, 21 Imm. L.R. (3d) 205, [2002] O.J. No. 3074, [2002] O.T.C. 287, 2002 CarswellOnt 1429 (Ont. S.C.); and *Toiber v. Toiber*, 2006 CanLII 9407, 208 O.A.C. 391, 25 R.F.L. (6th) 44, [2006] O.J. No. 1191, 2006 CarswellOnt 1833 (Ont. C.A.). In support of his position against the father's request, counsel cites:

> There is a significant distinction between a child's family law status and his or her immigration status. The federal *Immigration Act* deals with the determination of immigration status and does not purport to preclude family law proceedings, the enforcement of extra-provincial orders or the return of a child to his or her country of habitual residence. The "right to remain in Canada" set out in section 4 of the *Immigration Act* does not constitute a broad blanket of immunity from other laws of general application, particularly those concerned with child protection and welfare. CLRA s.46 is not impaired, qualified or rendered inoperative by the *Immigration Act* under the doctrine of paramountcy. Therefore, the fact that a parent has made a refugee claim in Canada on a child's behalf did not preclude an Ontario court from returning the child to its country of habitual residence under the Hague Convention.

[23] Counsel for the father did not provide any case law to refute the reasoning of the court in the *Kovacs v. Kovacs* and *Toiber v. Toiber* decisions. Counsel merely submitted that the father's refugee claim would be determined in a shorter time frame than the claims considered in the decisions cited by counsel for the mother. Counsel for the father however did not provide any evidence from the appropriate immigration officials in support of his position. Furthermore, the courts' analysis in the *Kovacs v. Kovacs* and *Toiber v. Toiber* decisions do not focus on the issue of delay but rather paramountcy.

[24] For these reasons, I deny the father's request to delay the determination of the Hague Application until a determination is made regarding his refugee claim.

5.2: Question 2: Are the Elements Established to Conclude that the Father Committed a Wrongful Removal or Retention of the Child?

5.2(a): Does the Mother Have Rights of Custody to K. Z-A. as Required under Article 3(a) of the Convention?

[25] Counsel for the parties indicated a consent by the parties recognizing that France was the habitual residence of the child K. Z-A. Given this consent, it is necessary to examine the French law to determine whether or not the mother has rights of custody.

[26] The evidence filed by both parties confirms that the child K. Z-A. resided with the mother as of February 2012. This arrangement was subsequently confirmed by the 25 May 2012 and 24 January 2014 orders of the Tribunal de Grande Instance de Bonneville. The 24 January 2014 order further awarded to the mother exclusive parental authority regarding K. Z-A.

[27] The evidence filed by both parties further confirms that the removal of K. Z-A. from France to the Ukraine on 23 February 2013 was not consented to directly by the mother or indirectly by her actions. Furthermore, the evidence filed by the mother confirms that she actively sought the return of K. Z-A. to her care upon being advised by the father that he had fled to Ukraine. The mother has provided as exhibits to the hearing documents she provided to the Central Authority in France which was forwarded to the Central Authority in Ukraine.

[28] Counsel for the father did not, in submissions or in the materials filed on behalf of the father, dispute the terms of the 15 May 2012 or the 24 January 2014 orders.

[29] The documentary evidence, in addition to the parties' own evidence by affidavit, supports a finding that the mother had custody rights with respect to K. Z-A. Accordingly, the condition required in paragraph (a) of Article 3 of the Convention is met.

5.2(b): Was the Mother Exercising Her Rights of Custody at the Time K.Z-A.

Was Brought to Canada as Required by Article 3(b) of the Convention?

[30] Article 3(b) of the Convention has been defined as "meaning that the custodial parent must be maintaining the stance and attitude of such a parent." *Re H.; Re S. (Abduction: Custody Rights)*, [1991] 2 A.C. 476, [1991] 3 All E.R. 230, [1991] 3 W.L.R. 68, [1991] 2 F.L.R. 262, [1991] Fam. Law 427 (H.L.).

[31] Counsel for the mother submits that his client was exercising rights of custody to the child prior to the unlawful removal by the father.

[32] Counsel further relies on the temporary order dated 25 May 2012 granting the mother primary residence. The evidence of the mother and the father is that the child resided with her mother as of February 2012. There is no contrary evidence to the effect that this arrangement, namely that the child resided with her mother and had access to her father, was altered by the parties or a court order.

[33] Counsel for the mother also refers to exhibit 10 to the affidavit of J. Balasingham, sworn on 15 April 2014. This exhibit is a request submitted by the mother on 29 July 2013 to the Central Authority in France for the return of K. A-Z due to the unlawful removal to the Ukraine by the father.

[34] This document, completed and submitted by the mother coupled with the mother's affidavit describes how the father did not return the child, K. Z-A. to her mother's care following an access visit during 23 to 25 February 2013.

[35] At paragraph 32 of the father's affidavit he states "To protect my child from sexual harassment of her mother's boyfriends, I left with [K.] to Ukraine on 23 February 2013." At paragraph 33, he states, "In search of a safe and stable environment, on October 23, 2013, my child and I came to Canada."

[36] By his own evidence, the father acknowledges the removal of the child from the care of the mother in February 2013. Accordingly, the condition required in paragraph (b) of Article 3 is also satisfied.

[37] I further find that the father's retention of K. Z-A. to Canada in October, 2013 is wrongful and a breach of the mother's rights under Article 3 of the Convention.

5.3: Question 3: Are there any Defences Established by the Father to his Wrongful Removal or Retention of the Child?

5.3(a): Has the Child Settled in Her New Environment?

[38] Article 12 of the Convention provides as follows:

> 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, . . .
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

[39] The mother initiated the Hague Application on 13 March 2014. The unlawful removal or retention by the father has therefore exceeded the one-year period referred to in Article 12.

[40] Counsel for the father did not raise in his submissions, nor is it pleaded in the father's materials, that the child K. Z-A. is now settled in her new environment in Canada.

[41] Counsel for the mother did address this point in submissions. Counsel submits that the child K. A-Z is not settled in Canada for the following reasons:

(1) the child has been retained by Canada Border Security in a detention centre since her arrival in Canada on 23 October 2013;

(2) there is no citizenship application filed on behalf of the child;

(3) a claim for refugee status was made on behalf of the child but subsequently withdrawn by the father and only recently re-submitted for consideration; and

(4) the refugee claim being requested to be re-considered by the father is unlikely to succeed.

[42] I accept counsel for the mother's submission that the father's evidence does not establish that the child, K. Z-A. has settled in Canada. The outcome of her refugee status is unknown as is her ability to remain in Canada under this immigration application. Furthermore, she has resided in temporary accommodations due to the detention of her father. K. Z-A. has therefore not settled in her new surroundings since her arrival in Canada in October of last year.

5.3(b): Would the Return of the Child to France Expose K. Z-A. to a Grave Risk of Psychological or Physical Harm or Place the Child in an Intolerable Situation?

[43] Article 13(b) provides an exception to Article 12 such that, even in the event that the court finds a wrongful removal or retention, the return of the child is not required if the person who opposes the return establishes that:

> (*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.

[44] Counsel for the father relies on Article 13(b) of the Convention to support his client's position that a return of the child to France should not be ordered.

[45] The father's evidence in support of his argument is as follows:

(1) the parties' relationship broke down due to the mother's adulterous conduct and her excessive consumption of alcohol;

(2) this conduct by the mother had a negative effect on the child;

(3) the child disclosed on numerous occasions to him that she was "*sexually molested*" by the mother's friends;

(4) these incidents occurred while the child was left in a room while the mother was "*partying with several male friends in the other room*";

(5) these disclosures have also been made to third parties, notably a psychologist consulted by the father who saw the child and incorporated into a report dated 11 July 2012 the child's disclosures and fears;

(6) the father, in light of these disclosures, attended on 1 August 2012 at the police station in Chamonix, France and filed a report describing how the child's genitals were touched by the mother's friends and that his child was forced to shower with a man with a mustache;

(7) the father made numerous complaints regarding the sexual abuse suffered by his child to various governmental officials;

(8) the mother falsely accused him of suffering from mental health disorders;

(9) that the father was threatened on numerous occasions by the mother's boyfriend who also asked for money from him if he wished to see his child;

(10) that the father filed a refugee claim upon arrival in Canada, that he mistakenly withdrew the claim which has subsequently been re-filed with a request for reinstatement and that the basis of the claim is for protection for himself and his child; and

(11) that the father indicated in the withdrawal of his claim for refugee status that he could only return to Ukraine and not to France.

[46] Justice Gérard V. La Forest in the Supreme Court of Canada's decision in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 173 N.R. 83, 97 Man. R. (2d) 81, [1994] 10 W.W.R. 513, 79 W.A.C. 81, 119 D.L.R. (4th) 253, 6 R.F.L. (4th) 290, 1994 CanLII 26, [1994] S.C.J. No. 6, 1994 CarswellMan 91, stated, at pages 596-597 of the decision, that Article 13(*b*) must be interpreted by Canadian courts as follows:

> It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation". The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation. . . . In *Re A. (A Minor) (Abduction)*, *supra*, Nourse L.J., in my view correctly, expressed the approach that should be taken, at p. 372:

> The risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words "or otherwise places the child in an intolerable situation".

[47] In considering all the evidence provided by both parties, I find that this case does not meet the threshold of Article 13(b). I make this determination for the following reasons:

(i) the temporary order granted by Mr. Justice Poitrineau on 25 May 2012 granted temporary primary residence to the mother and specifically made reference that neither party raised any allegations of neglect or at risk behaviour regarding the caring of their less than 4-year-old child;

(ii) there is an absence of evidence from either party as to any concerns between the granting of the temporary order on 25 May 2012 and 11 July 2013 when the father brings the child for a consultation with a psychologist, Dr. Martine Bregent;

(iii) Dr. Bregent's report dated 11 July 2012 is clear that the consultation with the father was at his request and without the involvement, and perhaps the consent or knowledge, of the mother. There is no indication that Dr. Bregent was aware of the mother's position regarding the allegations made by the father or her recital of the parties' relationship pre and post-separation;

(iv) Dr. Bregent's report is unclear whether the child was seen outside the presence of the father;

(v) Dr. Bregent's report is clear that the child tells a story in Russian which is translated by her father. However the child discloses in French that she is unsure if she will arrive alive;

(vi) Dr. Bregent's report does not provide any follow-up recommendations to address the allegations of sexual abuse or her fear of loss of life. Dr. Bregent does recommend some psychological services for the child due to her fear of losing her father and social and familial attachment issues;

(vii) The allegations raised by the father occurred following the granting of the order on 25 May 2012, therefore during the court's involvement in the determination of the issues arising from the parties' separation. The father did not seek redress from the French courts regarding the concerns he had regarding the child, this despite the fact that the father's evidence indicates that his concerns regarding his child's safety emerged as early as April 2012 and throughout the period between April to July 2012;

(viii) The father was aware of the court process yet did not avail himself of this forum to raise his concerns regarding the mother;

(ix) The removal of the child by the father was facilitated by the father's falsely signing the mother's name on a travel authorization letter which also at-

tached a copy of her passport. This document was faxed to the father's lawyer, Me Pessey Magnifique, by the father;

(x) The father's evidence is that, on 6 July 2012, he took his child to the doctor due to his discovery of a rash on her buttocks and upper leg. The evidence does not indicate that the father disclosed to the doctor his fears that his child was being sexually abused or neglected while in the care of the mother;

(xi) The father's evidence discloses that he was wanting to flee to Canada as early as 16 January 2012 with his child due to fears for their safety. The father's evidence indicates that he discussed this plan with two friends;

(xii) The complaints made by the father for fear of his life due to threats by the individual he identifies as the mother's fiancé have not resulted in any criminal convictions against this individual despite the father's complaints laid with this local police authority;

(xiii) There is no independent evidence to support the father's allegation that the mother and the individual he identifies as the mother's fiancé offered the child for sexual favours to individuals on four (4) occasions in Moscow;

(xiv) The father 's evidence indicates that the child was treated by a psychiatrist, Dr. Kobilinskaya, for eight months following the father's removal of the child to Ukraine in February 2013. No report was provided by this Dr. Kobilinskaya to identify the reasons for this treatment, the issues of concern or any recommendations;

(xv) There is no independent evidence to support the father's allegation that the child was sexually abused by a doctor in Corsica, and four individuals in Paris when she was between the ages of four (4) and five (5) years of age;

(xvi) There is no independent evidence to support the father's claim that the child was beaten by the mother, the individual he identifies as the mother's fiancé and an third individual and threatened by these individuals not to disclose these incidents to her father;

(xvii) There is no independent evidence to support the father's allegation that the mother never attended to the needs of their child and that her main concern was the care of her parents and siblings;

(xviii) There is no independent evidence to support the allegation that the mother engaged in prostitution thereby endangering the child;

(xix) There is no independent evidence to support the allegation that the mother forced the child, then four (4) years of age, to consume beer and wine;

(xx) Two (2) of the father's character references provide written statements in March/April 2012 that describe the mother and the father in a positive light without any concerns regarding their parenting, interactions with one another or with K. Z-A.;

(xxi) The report of Dr. E. Tomao, psychiatrist, dated 21 January 2013 and ordered by the court on 25 May 2012, concludes that the child is equally attached to both parents, without demonstrating a preference between them. The report highlights some concerns regarding the child being exposed to parental conflict given the parents' separation. The recommendations of the report are limited to following the child so as to ensure no further impact due to the parties' separation occurs. The recommendations are silent regarding allegations of sexual and/or physical abuse of the child;

(xxii) The mother's evidence is that she denies the allegations made against her by the father. Furthermore, she denies knowing the individuals named by the father save and except the individual the father identifies as her fiancé. The mother further denies that this individual has harmed her or her child.

(xxiii) The mother's evidence is that the father was found guilty of assaulting the individual the father identifies as her fiancé by the Tribunal Correctionnel de Bonneville on 17 September 2012 and that this decision was upheld by the Court of Appeal of Chambery on 13 March 2014; and

(xxiv) Despite the allegations against the mother, the father indicates in his evidence that he has always stated that the mother is a good mother however under the control of her parents.

[48] Counsel for the father raises the argument that a psychological assessment should be completed prior to the court's considering the Hague Application. The father's argument is that such an assessment could provide the court with evidence as to what is in the child's best interests.

[49] The Supreme Court of Canada's decision in *Thomson v. Thomson*, *supra*, is clear in establishing the principle that, in considering a Hague application, the court is not to embark on a consideration of a child's best interest unless the criteria under Article 13(b) has been met and establishes a defence to the return of the child despite an unlawful removal or retention.

[50] The father has not met the criteria to establish an Article 13(b) defence. Accordingly the consideration of what is in K. Z-A.'s best interest is an issue to be decided by the courts in France.

5.3(c): Does the Child K. Z-A. Object to Being Returned to France and if so, Has the Child Attained an Age and Degree of Maturity at Which It Is Appropriate to Take into Account the Child's Views?

[51] Article 13 of the Convention further provides:

> 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 ac-

count of its views.

[52] Counsel for the father submits that the child K. Z-A. has clearly expressed to the father and to third parties her objection to returning to France.

[53] Counsel refers to the affidavit of Yana Apanovitch, a paralegal student with his office, sworn on 20 April 2014. The affidavit describes a meeting between the student and the child on 9 April 2014. During this meeting, the child disclosed to the student the abuse and neglect she suffered while in the care of her mother. The child further disclosed that she does not wish to return to the care of her mother and that she is afraid of returning to France.

[54] The introduction of this affidavit was not objected to by counsel for the mother. He however did make submissions that little weight should be given to the affidavit as there is no indication of Yana Apanovitch's experience in interviewing children, that there is no indication that her father was not present during this meeting, that there is no context provided to support the disclosures by the child as outlined in the affidavit.

[55] I have reviewed the affidavit and have concluded that it does support an indication that the child has stated, in this interview, views that she does not wish to return to France. However, I do not accept that this expression is a consistent indication of the child's views given that the child has not attained an age and degree of maturity at which it is appropriate for me to take into account the child's views.

[56] The record before the court includes a psychological report ordered by the the Tribunal de Grande Instance de Bonneville on 25 May 2012. This report, by Dr. E. Tomao, is dated 21 January 2013 and is attached as exhibit "G" to the affidavit of the father sworn on 22 April 2014.

[57] At page 5 of his report, Dr Tomao notes that the child, K. Z-A. is five and a half (5½) years of age at the time of his meeting with her. The report describes in detail her demeanour as being timid, the child having a limited vocabulary and demonstrating hesitancy in answering the questions posed to her.

[58] The child is currently nine (9) years old. The father has provided evidence through his own affidavit of the child's objection to returning to France. There is also the affidavit of Yana Apanovitch.

[59] The evidence provided does not satisfy me that the child has attained an age and degree of maturity which makes it appropriate for me to take into account her wishes.

[60] Accordingly, the following findings are made:

1. The child was habitually resident in France at the time of her removal;
2. The mother has rights of custody to K. Z-A. under the law of France;

3. The mother was exercising her rights of custody to the child at the time of her removal from France by her father;
4. The child is being wrongfully detained in Canada in breach of the mother's custody rights under Article 3 of the Convention;
5. Returning the child to France with her mother would not expose her to a grave risk of physical or psychological harm or place her in an intolerable situation;
6 The child's views cannot be taken into account regarding her return to France as she has not reached an age and a degree of maturity sufficient for these views to be considered.

[61] K. Z-A. is likely to experience some distress in being returned to the care of her mother. The evidence is clear that the child has had no contact with her mother since February 2013. The court is therefore concerned with how the transition from the care of the father to the mother is to be undertaken.

[62] This court has the authority to impose undertakings to ease the transition between parents of the child's care before the court of the child's habitual residence becomes involved in the matter. At the hearing, I asked counsel for the mother for his submissions on how the transfer of the child was to occur should I decide to order the return of the child to France. Counsel for the mother was able to only advise me that, should such an order be granted, the mother would make arrangements to travel to Canada.

[63] I find that I am lacking information in order to provide details regarding the return of the child to France. Accordingly, I am ordering that counsel for the mother provide answers to the following questions:

(1) When is the mother proposing to come to Canada?
(2) What is her proposal regarding assuming the care of her child?
(3) How and when will the child be returned to France?
(4) Given that there has been no contact between the mother and the child for over fourteen (14) months, is the mother of the view that some contact should be initiated in Canada prior to the return to France?
(5) If so, can access between the mother and the child be arranged at the Immigration Holding Centre where the child is currently detained?
(6) If such access is possible, under what circumstances, frequency, duration and location can these occur?

This information is to be provided to the court and opposing counsel by counsel for the mother, in writing, within five (5) days. Thereafter, a conference call will be arranged through my assistant, Ms. Laurie Findlay, at 9:15 a.m. to occur during a date convenient to the parties and myself during the week of 12 May 2014 in order for me to determine these transitional issues. Counsel may co-ordinate a date amongst themselves and then contact Ms. Findlay at (905) 456-4833.

Released: 2 May 2014

Justice Lise S. Parent