CITATION: Monari v. Ojo, 2019 ONSC 4879
COURT FILE NO.: FS1911247
DATE: 20190819

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
Manuele Monari		
	Applicant	James S. Marks, for the Applicant
– and –		
Mercy Ojo		Tricia Simon, for the Respondent
	Respondent	
		HEARD: August 19, 2019

SHORE, J.

[1] In August 2017 the applicant father arrived at the matrimonial home, in Castelfranco Emilia, Italy, where his daughter Noemi had been living with the respondent mother, to find no one home and the house deserted. What followed was a two-year search to locate his daughter. This search narrowed when he happened upon a picture of his daughter on social media and recognized a landmark in Canada. The father filed a Hague application in September 2018 in Italy. Through the assistance of the Central Authority it was only in April 2019 that he was able to confirm that his child was in fact in Toronto.

[2] The Father arrived in Toronto on July 27, 2019 and rented a furnished studio apartment for one month. On July 30, 2019, the father obtained an ex-parte order directing the police to attend the mother's address to seize the child's documents and an order that the child live with the father at his temporary address in Toronto until the matter returned to court. The matter was brought back before me on August 8, 2019 for the return of the ex-parte motion to allow service of the documents on the mother. At that motion, the mother requested an adjournment to file her materials. The adjournment was granted with the next attendance being peremptory on the Mother. An order was made leaving the child in the father's care pending the hearing of the application and that the Mother deliver the child's passport and other documents to the father's lawyer forthwith. A timeline was set up to exchange materials. Despite two court orders, the mother had not produced the child's passport. The matter returned before me again on August 15th and 16th but counsel for the Mother did not

attend as she was ill. The Mother did bring documentation showing that the child's passport was being held by Canada Border Services Agency. The matter was adjourned to today.

Hague Convention:

[3] The purpose of the *Hague Convention*, as set out in Article 1, is to enforce custody rights and secure the prompt return of wrongfully removed or retained children to their country of habitual residence. A prompt return is aimed at speedy adjudication of the merits of custody or access dispute in the forum of a child's habitual residence. The question being asked in a Hague Application is not which parent should have custody, but in which jurisdiction should the question of custody be determined.

[4] When hearing a Hague Application, the first question to be asked is whether there has been a removal or retention of the child from their habitual residence that is considered wrongful under the Convention. For the Convention to apply, the Court must find:

a. The removal or retention is in breach of **rights of custody** attributed to a person 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 exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

[5] If the requirements under Article 3 are met, Article 12 obligates the judge to order the return of the child forthwith, unless certain exceptions apply. These exceptions include:

a. the parent seeking the return was not exercising custody or consented to the removal or retention-Article 13(a) (This does not apply to this case. See discussion below.)

b. there is grave risk that the return would expose the child to physical or psychological harm or place the child in an intolerable situation – Article 13(b) (See discussion below.)

c. the child of sufficient age and maturity objects to being returned - Article 13(2) (There is no claim being made under this exception.)

d. the return of the child would subject the child to basic violations of fundamental human rights and fundamental freedoms in the requested state - Article 20 (This certainly does not apply to Italy nor has the mother made any such claim)

e. the application was brought one year or more from the date of wrongful removal or retention, and the judge determines the child is settled in the new environment - Article 12. (See discussion below).

Habitual Residence was in Italy:

[6] At the start of the motion, the Mother advised that she was not conceding that the child's place of habitual residence was Italy at the time that she removed the child. Her position was that because the Father was spending significant time living in other countries, Italy was not the child' habitual place of residence. I disagree.

[7] There is no definition of "habitual residence" in the *Hague Convention*. It is a question of fact to be determined by the court. The judge must determine the focal point of the child's life immediately prior to the removal, considering all relevant considerations arising from the case.

[8] There should have been no dispute that the child was habitually resident in Italy when she was removed by her mother. The child's connections to Italy when she was removed by her mother included the following:

a. the child was born in Italy;

b. had never lived anywhere other than Italy until removed by her mother in July 2017;

c. had an Italian birth certificate, passport, and citizenship and did not have similar status in any other country;

d. the child's primary residence (as per the Italian Court order) was with her mother, who lived in Italy;

e. attended school in Italy and had never attended school in another country;

f. Social Services in Italy completed an investigation, to assist the Italian court in determining custody and access;

g. a custody order was made by the Italian courts just months before she was removed with a scheduled return date of September 2017; and

h. the child's friends were in Italy.

[9] The Mother's lawyer argued that because the child lived primarily with her mother, her place of habitual residence was with her mother, regardless of where she lived. She further argued one parent can change a child's habitual place of residence and refers to the hybrid approach set out recently by the Supreme Court of Canada: *Office of the Children's Lawyer v. Balev*, 2018 SCC 16. The legal point she has missed is that the court considers the child habitual place of residence immediately prior to the removal, not subsequent to the removal. Further, in *Balev*, the children had lived in Germany and moved to Ontario for the school year with both parties' consent. After the consent period lapsed, the children remained in Ontario. The question in *Balev* was whether a child's habitual residence can change while he or she is staying with one parent in another country under the time limited consent of the other. In the case before me, the father did not consent to Noemi moving to

Canada and did not even know where she was for quite some time after her removal. The facts are entirely different.

[10] For the reasons set out above, I find that the child's habitual place of residence was in Italy immediately prior to her removal. She had no connection to any other country at that time.

Father had Rights of Custody:

[11] There is no dispute that the Father had custody rights in Italy. First, the order of the court in Modena, Italy, dated May 23, 2017, provides that the parties have joint custody of the child. This order was made only months before the child was wrongfully removed from Italy. Further, while the Mother had primary residence of the child, the father had access, as set out in the order. In addition, the Central Authority of Italy provided confirmation that the Father had parental responsibility for the child, which includes the right to decide the child's habitual residence and therefore the child was being unlawfully retained in Canada.

Custody Rights Were Being Exercised:

[12] There is no dispute that the father was exercising his custodial rights at the time that the child was removed from Italy.

[13] All the conditions in Article 3 of the *Hague Convention* have been met and as such, I am required to order the return of the child, unless one of the exceptions applies.

Do any exceptions apply:

Grave risk to the child:

[14] The mother is claiming under Article 13(b) that there is a grave risk that the return of the child to Italy would expose the child to physical or psychological harm or place the child in an intolerable situation.

[15] The Convention sets a high threshold of a "grave risk" of physical or psychological harm or otherwise placing the child in an "intolerable situation". Any interpretation short of a rigorous one, with few exceptions inserted in the Convention, would rapidly compromise its efficacy: *Ellis v. Ellis,* 2010 ONCA 347 at par 38-40. An assessment of risk involves not only an assessment of the severity of the harm, but also an assessment of the likelihood of it occurring. A test for severity was set out by the Court of Appeal in *Jabbaz v. Mouamman* (2003), 38 R.F.L. (5th) 103, at paragraph 23, as "an extreme situation that is unbearable; a situation too severe to be endured".

[16] Justice Abella's decision in *Pollastro v. Pollastro,* 1999 CarswellOnt 848 (Ont. C.A.) is often referred to in Ontario decisions on the issue of grave risk. In *Pollastro,* there was ongoing physical violence causing the wife to be "bruised front and back". The incidents escalated. When she came home from work one day the husband ripped her T-shirt, banged her head against the floor and later locked her in the bathroom (par 9). Two days later, he

disabled her car and she was forced to walk to work carrying the baby, frightened because the husband followed her most of the way. She decided to leave him that day but when she returned home to retrieve some clothing her husband started assaulting her and she had to escape through the bedroom window. Her doctor documented the extent of the bruises on her neck, arms, back, shoulders and thighs as well as the child's agitated state. Her husband continued to harass her as well as some of her former co-workers. He harassed her mother, her father and her cousin, calling incessantly, threatening his wife and her family. He talked about exacting revenge on his wife, and that if he could not have the child no one would. He made death threats and told her she would never see her son again. He acknowledged drug use and was often drunk. There was overwhelming evidence of him threatening to kill or harm his wife and/or the child. The husband could not control his temper and showed ongoing irresponsible, and irrational behaviour. Justice Abella found that the "potential for violence to be overwhelming" (par 36).

[17] Virtually all of the allegations of abuse alleged by the Mother in the case before me took place prior to the custody order of the Italian Courts, made in May 2017, just a few months prior to the child's removal from Italy. All of this evidence would and should have been before the court at that time. Both parties were represented by counsel. Further, the parties participated in an assessment by Social Services in Italy, wherein the Mother acknowledged the Father was a good father to the child. Social Services describe a healthy, well adjusted child, caught in an acrimonious divorce of her parents. The Mother acknowledged the Father had a positive role in the child's life. Ironically, her biggest fear was that the Father would remove the child from Italy. The Court ordered joint custody. There was no evidence before me to suggest that the decision was wrong or was being appealed or that the Court did not have all the allegations before it when determining custody.

[18] But even if I were to accept all of the mother's allegations of the Father's abusive behaviour in the case before me, it would not amount to an "extreme situation" and would not meet the Applicant's onus of proving that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the children in an intolerable situation. In the case before me, the facts do not come close to severity described in *Pallastro*.

[19] In *Friedrich*, a U.S. Court of Appeal decision, Justice Boggs relies on *Thompson*, the Supreme Court of Canada decision when considering Article 13(b) and further states:

> *A grave risk of harm for the purposes of the Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger* ***prior to the resolution of the custody dispute****-e.g. return the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect or extraordinary emotional dependence,* ***when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection****. (emphasis added)*

[20] This interpretation has been endorsed and adopted by the Ontario Superior Court of Justice and affirmed in the Ontario Court of Appeal. The basic presumption of the Convention is that all contracting states are equipped to make, and will make, suitable arrangements for a child's welfare. That presumption is rebuttable, but the onus is on the Mother to establish an exception to the convention. The Respondent has not rebutted this presumption.

[21] The Mother relies on a series of cases decided under the *Immigration and Refugee Protection Act*, which consider the test for assessing "state protection" and whether a country is able and willing to provide adequate protection. Given the large jurisprudence we have of cases that specifically consider Article 13(b) of the *Hague Convention*, I do not find those cases helpful or relevant.

[22] The Mother has not shown that the Court in Italy is incapable or unwilling to give the child adequate protection.

[23] I find that the allegations of the Mother are insufficient to find that the requirements of Article 13(b) of the Convention have been met.

Is the Child Settled in Ontario?

[24] Under Article 12 of the *Convention*, if I determine the child is settled in her new environment, the court has discretion not to order the return of the child because the application was brought more than one year from the date of the wrongful removal. I do not find that the child has settled into her new environment nor would I exercise my discretion to leave the child in Ontario.

[25] This Application was brought more than one year from the date of the wrongful removal. The Father did not even know where the child was residing until close to the two-year anniversary of her removal. However, I do not find that the child is settled in Ontario.

[26] The mother is a citizen of Nigeria and of Italy. When she initially arrived in Canada in July 2017, she made a claim for refugee status. Her initial claim for refugee status in Canada was denied. Her appeal was denied. Following the commencement of these proceedings, she made a humanitarian and compassionate application in Canada, based on an argument that it is in the best interest of the child. I find she has been deliberately evasive and vague in making disclosure with respect to her claims. The mother and child currently have no status in Canada, although she can remain here on a temporary basis while her next claim is being determined. Both she and the child can easily return to Italy as they are both Italian citizens. The child's "settlement" in Ontario is precarious at best.

[27] The mother describes the activities she does in Toronto with and for the child, none of which are specific to Ontario. She provides scant information on the child's connections to Ontario. In fact, most of the activities she described center around keeping the child connected to Italy, including attending Italian based school and church and has friends who are both Nigerian and Italian. The Mother speaks to the child in Italian. I therefore decline to make a finding that the child is settled in Ontario.

[28] The Mother's lawyer refers to *S.M.B. v. A.J.M.*, 2016 BCSC 811, wherein Justice Young does not order the children returned to Spain. However, the facts in that case are easily distinguishable. The Father consented to the children living in British Columbia for two and half years before he moved under the *Hague Convention*. That case is more akin to the SCC decision in *Balev*. The children lived in British Columbia for over two years before they were wrongfully retained. The key objective of the Hague Convention is to deter parents from wrongfully changing the children's habitual place of residence. In *Balev* and *SMB*, the residence was initially changed with consent. Deterrence does not play as active a role in decision making. In the facts of the case before me, the policy of deterrence is stronger. The Mother hid Noemi's location from the Father. She cannot deliberately delay an Application to defeat the left behind parent's claims: *Kubera v. Kubera*, 2010 BCCA 118 and *S.M.B.* at par 92. Further in S.M.B. the child was 13 years old and his views were a strong consideration for the court. Noemi's views are not before the court and she is 8 years old.

[29] Order to go as follows:

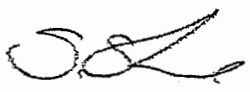
a. I find that the Respondent, Mercy Ojo, unlawfully removed the child, Noemi Elisabetta Monari, born September 14, 2010, from Italy in or around July 2017.

b. The child, Noemi Elisabetta Monari, born September 14, 2010, shall return to Italy with her father, Manuele Monari, by September 1, 2019.

c. Pending the child's departure, the child shall remain in the sold care and control of her father.

d. Police officers in the City of Toronto, OPP, RCMP and officers of any other law enforcement agency having jurisdiction are directed and authorized to enforce this order.

e. The Applicant is entitled to his costs and specifically any costs he incurred in his flight to and from Toronto, his accommodations while here, the return flight for the child and any other incidental costs incurred in locating the child and securing her return to Italy. If the parties are unable to reach an agreement on quantum, the Applicant shall serve and file written submissions, including his bill of costs and any offers to settle. The Respondent shall serve and file any responding material within ten business days of receipt of the Applicant's material. The written submissions shall be no longer than four written pages, not including attachments.



S. Shore, J.

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REASONS FOR JUDGMENT

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