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International Child Abduction: Safeguarding against Grave Risks of Harm in 'Prompt Return' Applications

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Case Commented On: *JP v TNP*, 2016 ABQB 613 (CanLII)

Introduction

In an earlier post, I discuss in detail the objective and mechanism of the *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 19 ILM 1501, to discourage the wrongful removal of a child from his or her habitual residence and the mechanism of 'prompt return' of the child to his or her habitual residence. In this post, I revisit the topic of international child abduction to discuss the decision of *JP v TNP*, 2016 ABQB 613 (CanLII) and the "grave risk" exception in Article 13(b) of the Convention. This exception can be invoked in 'prompt return' applications where a parent alleges that the child would be exposed to an "unreasonable and grave risk of physical and psychological harm" if the court ordered the child's return to his or her habitual residence. In *JP v TNP*, the Court of Queen's Bench of Alberta struck a fair balance between the competing interest of the child and the overall objective of discouraging international child abductions.

Background

JP v TNP involved a 'prompt return' application by an American father of two children to their habitual residence in Pennsylvania. The mother, a Canadian, did not dispute the fact that the habitual residence of the two children was Pennsylvania (where they had lived their entire lives). However, she sought to invoke the Art 13(b) "grave risk" exception on the basis of alleged abusive behaviour by the father. The family had come to Alberta in the summer of 2016 to visit the mother's relatives. At the end of the summer, the mother refused to return to Pennsylvania with the children, contending that the father posed a grave risk of physical and psychological harm to the children. Whilst in Alberta, the mother obtained an Emergency Protection Order (EPO) from the Alberta courts against the father. The father remained in Alberta until he was informed that he would be deported if he did not leave Canada immediately. This followed an RCMP intervention in response to a fight between the parents.

The background facts to the case included a collection of serious mental, physical and sexual abuse allegations raised by the mother, including the RCMP intervention as a result of threatening behaviour, death threats and instances of physical abuse against both the mother and at least one of the children. On one occasion, the father started to choke the mother in the presence of one of the children. He then took a gun and started shooting in the woods. There was evidence by the mother that the father hit one of the children when the child was in his sole care for six weeks prior to coming to Alberta and that the father "smacked" one of the children so hard that the child had finger marks on his face (at para 25).

This history of violence, along with the recognition that the breakdown of the parties' relationship could aggravate the situation, convinced an Alberta court to grant the EPO to the mother. To complicate the family difficulties further, their home in Pennsylvania was in foreclosure by the end of the summer of 2016.

Issue Before the Court of Queen's Bench

As neither parent challenged the habitual residence of the children, the sole issue before the Court was whether there was a grave risk that the return of the children to Pennsylvania would expose them to a risk of physical and psychological harm or otherwise place the children in an intolerable position as per Art 13(b) of the Hague Convention.

The Court set out the Canadian jurisprudence on the "grave risk" exception, noting that in *Thomson v Thomson*, [1994] 3 SCR 551 (CanLII), the Supreme Court of Canada held that psychological harm to a child would have to be greater than ordinarily expected when moving a child from one jurisdiction to another and that the harm must amount to placing the child in an "intolerable situation" (at para 31). One such case was *Pollastro v Pollastro* (1999) 43 OR (3d) 485 (Ont CA) (CanLII), where the court held that the return of the child to his habitual residence with an abusive and violent father in California would have placed him in an "*inherently* intolerable situation" (emphasis in original, at para 35).

In *DR v AAK*, 2006 ABQB 286, 396 AR 33 (CanLII), however, prior alleged sexual touching of the child by the father was insufficient to demonstrate that the child would face a grave risk of harm if the child was returned to France. The court there held that to successfully invoke the Art 13(b) exception, it is also necessary to establish that the country of the child's habitual residence would be unwilling or unable to protect the child from further harm.

In the case at bar, the Court of Queen's Bench also underlined that in order to determine the "grave risk" exception, the courts must not only consider the nature of the alleged harm, but also the "evidence supporting the allegations" (at para 40). The Court concluded that on the facts before it, it was not necessary to hold a hearing to test the evidence of the parents or to obtain expert evidence owing to the fact that "the risk of physical or psychological harm can be mitigated by ordering undertakings until this issue and other issues relevant to the custody of the children are determined by the court in Pennsylvania" (at para 47). With this reasoning, the Court emphasised the summary nature of the Hague Convention mechanism, and struck a fair balance between the competing interests.

Imposing Mitigating Safeguards

In its consideration of the "grave risk" exception, the Court examined the Canadian case law on mitigating safeguards imposed to ensure a child's safety and well-being when a court orders the return of a child to his or her habitual residence pursuant to the Hague Convention. For example, in *Thomson*, the Supreme Court of Canada discussed the possibility that when ordering the return of a child to his or her habitual residence, a court may require undertakings from the requesting party so as to ensure that the best interests of the child are protected. If there is a risk of physical or psychological harm, and this can be mitigated against by ordering undertakings, "the court should pursue that" (at para 31). On the facts in *Thomson*, the father accepted undertakings that were sufficient to mitigate the effects of the return of the child to Scotland and the court found that it was unlikely that the child would face grave risk of harm.

The Court of Queen's Bench also noted that *Rechsteiner v Kendell* (1998), 39 RFL (4th) 127, 58 OTC 184 (Ont Ct J, aff'd (1999), 1 RFL (5th) 1001, 125 OAC 356 (Ont CA) (CanLII) (at para 34), confirmed that a finding of grave risk to the child under Art 13(b) does not automatically end the inquiry. Rather, "if undertakings can mitigate the risk and allow for an eventual return, that is another avenue the Court may elect to take" (at para 34).

The Court also reviewed *Finizio v Scoppio-Finizio* (1999), 46 OR (3d) 226 (Ont CA) (CanLII) and agreed with its conclusion that the courts of the child's habitual residence are the most suitable forum for determining the long-term best interests of the child. In *Finizio*, the Ontario Court of Appeal undertook an evaluation of whether the Italian authorities had failed to protect the children in the past and noted that the Hague Convention mechanism operated on the presumption that "the other contracting state will make suitable arrangements for the children's welfare" (at para 38). The court in that case highlighted the use of mitigating undertakings when a court is asked to determine the risk of potential harm in Art 13(b) applications. On the facts, the father had agreed to provide the children and their mother with separate accommodation as well as a lump sum payment to assist them until the Italian courts could formalise the support obligations. The father also undertook to refrain from engaging in harassing behaviour towards the mother. These measures were intended to mitigate the alleged negative effects of promptly returning the children to Italy.

Commentary

The mother was unsuccessful before the Court of Queen's Bench of Alberta in establishing that the return of the children to Pennsylvania would expose them to an intolerable and grave risk of physical and psychological harm under Art 13(b) of the Hague Convention. The Court ordered their return to their habitual residence, but imposed conditions to ensure their safety in their transition back to living in Pennsylvania. This is arguably the correct decision, owing to the underlying objective of the Hague Convention mechanism and its strict implementation by the reciprocal courts of signatory countries.

The decision of the Court illustrates that the children's interests and well-being *can* be safeguarded even when a 'prompt return' is ordered, as a court can impose conditions that must be met before a child may be returned to his or her habitual residence. Per *Thomson*, such conditions are designed to ensure a child's safety and well-being for the short period between the child's return and a determination of the substantive matter by the courts and authorities of the country of habitual residence. This process therefore strikes a fair balance between the underlying objective of the Hague Convention and the welfare of the child in question.

To mitigate the risk of the father continuing to pose a threat upon their return to Pennsylvania, the Court imposed a number of conditions to safeguard the children. These included: that the father would have to enter into a voluntary 'no contact' order with the mother upon the mother's return; that the mother must be given the opportunity to file for a Petition of Protection from Abuse in the Pennsylvania courts prior to the family's return (at which stage the 'no contact' conditions would be imposed); and that the mother must be given an opportunity to secure assistance from the authorities in Pennsylvania to obtain accommodation at a woman's shelter.

As the mother expressed concern that the father may violate the 'no contact' order, the Court imposed additional safeguards to ensure the safety of the mother and the two children. These included keeping the location of the family secret from the father upon their return until such time as the courts in Pennsylvania determined if this restriction was necessary. In the interim, the

father's access to the children would be limited to the ongoing weekly Skype contact as provided in the initial EPO of the Alberta courts. His application for interim custody was also rejected by the Court, pending a determination of custody by the Pennsylvania courts. As the sole employed party, it was also a condition of the family's return to Pennsylvania that the father secure the payment of the flights for the family and provide interim financial support for basic necessities for the children until support obligations were determined by the Pennsylvania courts. These conditions were secured by appropriate undertakings to the Court in Alberta and by the parties' agreement to file a consent order in Pennsylvania incorporating them.

The availability of mechanisms to protect the children and their mother in Pennsylvania, including automatic access to an emergency shelter as well as counselling and support services, were additional safeguards noted by the Court.

The decision of *JP v TNP* illustrates that even in arguably very difficult circumstances of serious allegations of abuse and violence, the courts are able to strike a balance between safeguarding the well-being of a child against grave risk and harm and the overall Hague Convention objective of deterring child abductions. This can be done by applying appropriate mitigating measures to ensure a child's safety and protection. The decision of the Court is therefore reasonable as it confirms the restrictive scope and limited availability of the Art 13(b) exception to interfere with the 'prompt return' of a child to his or her habitual residence.

This post may be cited as: Rudiger Tscherning "International Child Abduction: Safeguarding against Grave Risks of Harm in 'Prompt Return' Applications" (3 January, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/01/Blog_RT_InternationalChildAbduction.pdf