May 5, 2017

Update: SCC Grants Appeal on 'Prompt Return' Mechanism of the *Hague Convention on International Child Abduction*

By: Rudiger Tscherning

Case Commented On: *Office of the Children's Lawyer v John Paul Balev and Catherine-Rose Bagott*, Supreme Court of Canada, Leave to Appeal (37250)

Background

In an earlier post, I discussed the decision of *Balev v Bagott*, 2016 ONCA 680 (CanLII) and concluded that the ONCA was correct in its strict application of the 'prompt return' mechanism of the *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980. This meant that a 'time-limited' consent by one parent to relocate a child (on the facts, from Germany to Canada) could not amount to a unilateral change of the child's 'habitual residence' during the consent period. As a result, the retention of a child after the expiration of a consent period constituted a wrongful removal or retention in breach of the Convention mechanism.

Update

On April 27, 2017, the Supreme Court of Canada (SCC) granted leave to appeal from the judgment of the Ontario Court of Appeal (ONCA) without reasons. It also granted a motion to admit fresh evidence. Significantly, the SCC ordered the appeal to be expedited. It further directed the parties to advise in writing of any changes that might affect the record, in particular with respect to the current circumstances of the children and the custody proceedings in the courts in Germany.

Mr. Balev and Ms. Bagott are Canadian citizens and the parents of two children, who were born in Germany but who are both Canadian citizens only. It is my understanding that since the ONCA decision, a German court has subsequently granted custody of the two children to Ms. Bagott and that the children have returned with their mother to reside in Canada. The father continues to reside in Germany. These facts developed after the application to appeal was brought in October 2016, and therefore may influence the SCC's hearing of this appeal.

Issues for potential consideration by the Supreme Court of Canada

To recall, the issue before the ONCA was whether the habitual residence of the two children had changed from Germany to Ontario during the period of the father's time-limited consent so that the children were habitually resident in Ontario on the date that the consent expired. If so, the mother would not have wrongfully retained them in Ontario within the *Hague Convention* 'prompt return' mechanism.

With the exception of two periods of time in Canada (one undisclosed and the other from October 2010 to January 2011), the children had resided in Germany until April 19, 2013 when they arrived in Ontario with their mother. In April 2013, the parties had agreed to take the children to Canada so they could attend school, with the father signing a "Consent Letter for Children Travelling Abroad" for a period between July 2013 and August 2014. This consent is referred to as a 'time-limited consent' in international family law practice.

As I previously argued, evidence of 'settling in' (on the facts, settling in Canada) should not be relevant under a strict application of the 'prompt return' mechanism set out in Article 12 of the *Hague Convention*, where, as in this case, the father had brought an application to return the children within one year of the wrongful detention or removal of the child. This position has long been enshrined in the *Hague Convention* mechanism and confirmed by the Supreme Court of Canada in the leading decision of *Thomson v Thomson*, [1994] 3 SCR 551 (CanLII). But even where an application is brought after a one-year period, a child is not automatically settled in a new country. On this basis, I had previously concluded that the ONCA was correct in determining that "a parent's consent to a time-limited stay does not shift the child's habitual residence" (at para 42). I also agreed with the ONCA's position that the time-limitation of a consent fails to establish an "implication of permanency" that is a pre-requisite to a change of habitual residence (at para 42). It is important to recall that on the facts of this case, the time-limited consent contemplated an extension of the stay, but even if an extension had been agreed to by the father, the ONCA correctly held that "the extension does not defeat the time-limited nature of the consent" (at para 48).

In my previous post, I had concluded that because the SCC has previously stressed a strict application of the *Hague Convention* principles and emphasized the deterrent aspect extensively (see *VW v DS*, [1996] 2 SCR 108 (CanLII)), it would be surprising if leave were granted in this case. Despite this conclusion, with its decision to grant leave, the SCC is sending a signal that some issues in regard to the *Hague Convention* 'prompt return' mechanism require further clarification.

Assuming that the appeal proceeds, it is likely that there will be a focus on the legal status of time-limited consent letters and their legal consequences, including the issue of whether such consents can displace a child's habitual residence. As I noted in my previous post, the ONCA left open the possibility that on different facts, a consensual time-limited stay may be "so long that it becomes time-limited in name only and the child's habitual residence has changed" (at para 49). This may well be an issue for the SCC to consider. The practical challenge with giving time-limited consents an expansive interpretation is that this might undermine future parental consent (albeit for a time-limited period) for a child to travel to, or to reside on a temporary basis, in a different country from the child's habitual residence. A consenting parent would fear that their initial consent could be used to displace the child's habitual residence. From the perspective of the overall objectives and purpose of the *Hague Convention* mechanism, such a broad interpretation may have the detrimental consequence of undermining the deterrent effect of the 'prompt return' mechanism as unequivocally enshrined within Article 12 of the *Hague Convention* (see, for example, the decision of *VW*, above).

On the facts, due to the extensive delay in resolving this dispute, the de-escalating effect of the 'prompt return' mechanism has been lost. It is the loss of this crucial opportunity to deter international child abductions that leads me to re-emphasize the importance of deterrence in the

Hague Convention mechanism. It is hoped that the SCC will set out a clear position on this crucial aspect of the *Hague Convention* mechanism and to resolve the issue of time-limited consents in favour of a strict interpretation of the *Hague Convention* mechanism. It is important to recall that, as the ONCA set out, the factual issues before the Ontario court "transcend" the direct interests of the children involved to the overall interest of "countless other children and their parents" (at para 83). I look to the SCC for a strong endorsement of the court's previous emphasis on the deterrent effect of the *Hague Convention* mechanism (as in *VW*, for example).

At this point, it is unclear how the SCC will proceed with the appeal. The court may be asked to consider arguments for a 'modernization' of the *Hague Convention* mechanism, in particular, whether it should be reinterpreted through the lens of the rights of the child arising under human rights instruments (*e.g.*, the *Canadian Charter of Rights and Freedoms* or the *United Nations Convention on the Rights of the Child*). The *Hague Convention* mechanism has been operating for 33 years with currently 97 signatory states. Although the mechanism is not without fault, its relatively simple and expedited 'prompt return' procedure, with its associated effect on deterrence, has meant that the *Hague Convention* has been instrumental in reducing the number of international child abductions (not least due to the fact that outside of the *Hague Convention* mechanism, there are relatively few legal options for promptly returning a child to the country of habitual residence, see for example, Government of Canada, "International Child Abduction: A Guidebook for Left-Behind Parents"). On that basis alone, I would argue that any potential modification of the mechanism should proceed with caution. The overall *global Hague Convention* mechanism should be protected. A clear endorsement of the deterrent effect of the *Hague Convention* mechanism by Canada's most senior court would make a significant contribution not only to unlawful retentions and removals of children with a Canadian nexus, but would send a strong signal to all contracting state parties.

Ultimately, this appeal is an important opportunity for the SCC to reiterate Canada's obligations under the *Hague Convention* mechanism. The family dispute in *Balev* is a timely reminder that the overall interests of the child are best protected when the courts move quickly to determine applications for 'prompt return'. By expediting this appeal and granting leave, the SCC has sent a clear signal that international child abductions are critically important and raise complex legal and factual issues. It will be of great interest to see how the court addresses this appeal.

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