

Issue No. 35

Jurisdictional Interplay, the Hague Abduction Convention, and Family Violence : 2024 MBKB 64

Introduction

This is an interesting case involving a family in dispute over the return of a child to Ecuador pursuant to the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* and *The Child Custody Enforcement Act* (“Hague Abduction Convention”).

In this case, the Respondent (mother) sought to have the child remain in Canada, citing family violence and a risk to the safety and security of her and her child if the return was implemented. The Petitioner (father) opposed this and sought to have the consent Final Order, which allowed for the return, enforced.



Background

The parties began living with one another in June 2018, the month the child was born. They were married in June 2019 and subsequently separated in October 2019. The mother alleged the father was verbally and psychologically abusive during the relationship.¹

Following separation, the parties entered into a mediated agreement in Guayaquil, Ecuador, allowing for primary parenting to the mother, with a visitation regime to the father.² They were divorced on December 12, 2019.³

Shortly after, the mother began studying in Canada. The child remained in Ecuador initially,

but eventually the mother brought him to Canada, with the father signing consent for her to do so, as well as authorizing the mother to obtain Canadian permanent residency for the child.⁴

However, by spring of 2022 the parties had made several complaints to law enforcement in Ecuador and were pursuing different outcomes respecting the child’s country of residence. On April 7, 2022, the mother sought a departure authorization for the child, and the father opposed.⁵ After an incident involving the father’s refusal to return the child to the mother’s care while in Ecuador, the child was apprehended and

¹ *Arguello Achon v. Benitez Peralta*, 2024 MBKB 64, at para 44.

² *Ibid* at para 45.

³ *Ibid* at para 46.

⁴ *Ibid* at paras 47-51.

⁵ *Ibid* at para 53.

returned to the mother's care. The mother was granted a Protection Order prohibiting the father's contact with her or child.⁶ In November 2022, the father successfully obtained an order of specified visits with the child.⁷

The mother returned to Canada with the child on December 8, 2022, and the child was granted permanent residency that same day. The father had not authorized this and made reports about the mother to various agencies in Ecuador. The father alleged that the mother forged his signature and provided false documents in order to remove the child.⁸

In April 2023, the father commenced an application in Manitoba requesting the return of the child pursuant to the Hague Abduction Convention. The mother opposed the application.⁹ At a hearing on July 27, 2023, an agreement was reached for a consent Final Order allowing for the child's return to Ecuador by September 1, 2023. However, this was based on certain undertakings and commitments made by each party. Particularly, the father undertook several measures to ensure that the return of the child would occur in a safe, child-centred manner, without risk of the mother being arrested upon her return. Additionally, the undertakings were to ensure the mother felt secure with respect to her protective relief in place in Ecuador.¹⁰

Four days after the parties agreed to the above consent Final Order, the father wrote to counsel for the Central Authority indicating he had changed his position. A further hearing was set, and at that hearing, the father reluctantly agreed to ensure the mother would not be arrested

upon her return to Ecuador.¹¹ It was also ordered that the parties would undertake to ensure a positive return of the child to Ecuador, and that neither party shall commence further custody proceedings in Ecuador until after the mother returned to Ecuador.¹²

Subsequent to this, the father proceeded to take several measures in Ecuador that threatened the security of the mother and child and put her at risk of being arrested upon her return.¹³ For instance, following the pronouncement of the Manitoba Final Order, he immediately filed documents requesting to suspend the mother's parental authority. He also filed documents alleging that the mother's parents were unduly retaining the child in Ecuador (despite knowing the child was in Canada), and seeking an order of emergency custody. This led to an order allowing for the arrest of the mother and grandparents in the event of non-compliance. He also successfully had the majority of the protective measures of the Protection Order relating to the mother revoked.¹⁴

As a result of the father's actions, the mother sought to vary the Final Order, to prevent the return of the child to Ecuador, pursuant to Article 13(b) of the Hague Abduction Convention. The father opposed this, and sought to vary the Final Order, seeking to enforce the child's return.¹⁵

⁶ *Ibid* at para 55.

⁷ *Ibid* at para 58.

⁸ *Ibid* at para 60.

⁹ *Ibid* at paras 3-8.

¹⁰ *Ibid* at paras 11-12.

¹¹ *Ibid* at paras 13-15.

¹² *Ibid* at para 16.

¹³ *Ibid* at para 17.

¹⁴ *Ibid* at paras 66-71.

¹⁵ *Ibid* at para 2.

Issues

- 1) Has there been a change in circumstances since the Final Order was pronounced, such that Article 13(b) of the Hague Abduction Convention should be applied?
- 2) Does the outcome of issue one impact the court's decision as to whether the child should be returned to Ecuador?
- 3) If the child is returned to Ecuador, what is the appropriate plan for his return?¹⁶

Analysis of the Issues

Change of Circumstances

In order to allow the variation application, there must be a significant change in circumstances following the pronouncement of the Final Order. The Judge confirmed that the father's actions, which were contrary to the agreements of the Final Order, did amount to a significant change. The Judge found that the result of the father's

actions would place the mother in vulnerable position if she returned to Ecuador with the child.¹⁷

As a result of this concern for the safety of the mother and child, the Judge determined that Article 13(b) of the Hague Abduction Convention was applicable.

Application Article 13(b) of the Hague Abduction Convention

Article 3 of the Hague Abduction Convention provides that removal or retention of a child is wrongful when it 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 at the time of the removal or retention those rights were being exercised, or would have been so exercised but for the removal or retention.¹⁸ Article 12 requires the prompt return of a wrongfully removed child.¹⁹ However,

Article 13 sets out exceptions to Article 12. The mother relied on exception 13(b) which states that the judicial authority of the requested state is not bound to order the return of the child if it is established that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.²⁰

In her analysis, Justice MacPhail first confirmed the applicability of the Convention, citing that the mother had confirmed that the child was habitually resident at the time of his removal,

¹⁶ *Ibid* at para 21.

¹⁷ *Ibid* at para 72.

¹⁸ *Ibid* at para 33.

¹⁹ *Ibid* at para 34.

²⁰ *Ibid* at para 35.

and that the father had custodial rights to the child at the time of the removal.²¹

The onus of establishing the Article 13(b) exception is on the mother, and the Judge acknowledged the high threshold set out in previous case law.²² However, in this case, the Judge found the onus had been met. It was clear to the Judge from the history of proceedings in Ecuador that there was family violence perpetrated by the father. Following the Final Order, the father took steps to remove the protective measures the mother had obtained, putting the mother in a vulnerable position if she returned. The Judge stated that this demonstrated coercive and controlling behaviour, as well as a disregard for his commitments to the Manitoba Court.²³

Additionally, the father had attempted to mislead the Ecuadorian court, providing false information about the child's presence at the grandparents' home, when he knew this to not be true.²⁴ These actions led to further risk for both the mother and grandparents of being subject to a catastrophic situation if enforcement measures were taken by the Ecuadorian police.²⁵

Finally, pursuant to the Final Order, the parties had undertaken to maintain the current parenting arrangements until such time that a full hearing could occur in Ecuador after the return of the mother and child.²⁶ Despite this, the father attempted to file for custodial relief, that could have resulted in a warrant for the mother's arrest if she failed to comply.²⁷

The Judge found that all of the above resulted in a very precarious situation for the mother if she were to return with the child.²⁸ It also demonstrated the father's disregard for court ordered commitments that were aimed at providing a safe and child-focused return to Ecuador, thus showing an inability to put the child's best interests first.²⁹

In conclusion, the Judge found there was a material change in circumstances since the pronouncement of the Final Order, which gave rise to the application of Article 13(b) of the Hague Abduction Convention. The Judge found there to be a grave risk of physical or psychological harm to the child if returned to Ecuador, and as such the mother's application was granted, and the father's application for the child's return dismissed.³⁰

Takeaways

As this case is rather unique, it is a helpful guide and precedent for family lawyers who encounter similar cases in the future. The case sets out a concise summary of the interplay between the various jurisdictions, as well as the applicability

of the Hague Abduction Convention in this scenario. Justice MacPhail provides a detailed and useful analysis of the circumstances giving rise to the exception found in Article 13(b) of the Hague Abduction Convention.

²¹ *Ibid* at paras 38-40.

²² *Ibid* at para 74.

²³ *Ibid* at paras 76-78 and 82.

²⁴ *Ibid* at para 80.

²⁵ *Ibid* at paras 81 and 86.

²⁶ *Ibid* at para 83.

²⁷ *Ibid* at para 84.

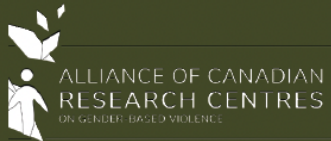
²⁸ *Ibid* at para 86.

²⁹ *Ibid* at para 87.

³⁰ *Ibid* at paras 88-90.

This bulletin was prepared by:

Heidi Dyck, JD
Lawyer, Wolseley Law LLP



Department of Justice
Canada

Ministère de la Justice
Canada