

CANADA / JUDGMENT

Jalili v. Bakhshizad

2024 BCSC 912

COURT

Supreme Court of British Columbia

DECIDED

30 April 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCSC 912 Jalili v. Bakhshizad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jalili v. Bakhshizad,

2024 BCSC 912

Date: 20240430

Docket: E240378

Registry: Vancouver

Between:

Mohammadreza Jalili

Petitioner

And

Samira Bakhshizad

Respondent

Before: The Honourable Justice Giaschi

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

C.H. Taylor

The Respondent, appearing in person:

S. Bakhshizad

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 30, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 30, 2024

- [1] THE COURT: All right, I will deliver my reasons now. I reserve the right to amend these oral reasons for grammar and clarity and to provide full citations if necessary.
- [2] The petitioner applies by way of petition under the Family Law Act, S.B.C. 2011, c. 25 [FLA] and the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, 1343 U.N.T.S. 22514 [Hague Convention] for a declaration that the child of the marriage, L. Jalili, born December 19, 2016, was wrongfully removed to and is wrongfully retained in this jurisdiction, and for an order that the respondent forthwith return the child to Denmark.
- [3] At the commencement of the hearing, the respondent, who was self-represented, requested an adjournment of the petition hearing, so that she could retain legal counsel. I denied this request on the basis that the respondent has known since January of this year that the petitioner was requesting the return of L. to Denmark and has had ample time to retain legal counsel. Further, under the Hague Convention, it is clear that these sorts of applications need to be decided expeditiously.

Facts

- [4] The petition is supported by an affidavit of the petitioner sworn April 3, 2024, in Frederiksberg, Denmark, and filed April 5, 2024.
- [5] In summary, the petitioner deposes in the affidavit that the parties are originally from Iran, are Iranian citizens, and moved to Denmark in approximately 2010. The parties met in Copenhagen in 2015 and married the same year. L. was born in Denmark in 2016.
- [6] The petitioner and L. both hold Danish residency permits. The respondent had a Danish residency permit as well, although it appears to have expired in 2021. L. holds a Danish passport valid until June 9, 2024, although the petitioner deposes it can be renewed because the child has a Danish residency permit.
- [7] I would note that the passport attached as an exhibit to the petitioner's affidavit appears to be something called, I believe it is, an alien's passport, so it may not be entirely the same type of passport as a Danish citizen possesses.

- [8] The petitioner further deposes that the parties themselves both hold Iranian passports, that L. has spent his entire life in Denmark, that he speaks English, Persian, and Danish. He deposes that in 2018, the respondent was granted sole custody of L., although he says this was done without his knowledge and that he was not aware of it until 2020.
- [9] He deposes that on October 13, 2022, the parties were granted joint custody of L. by the Danish court in Sonderborg, and he attaches the appropriate order of that court. He deposes that following the joint custody order, L. resided primarily with the respondent. The petitioner had parenting time on many weekends and for longer periods during holidays.
- [10] He deposes the parties had planned that L. would be with the petitioner during Christmas of 2023, while the respondent travelled. He deposes that on December 10, 2023, the respondent messaged him, advising that she was going to take L. with her on her trip. He deposes he was later told by friends that the respondent had gone to Canada with L. He says that upon further investigation, he discovered the respondent had in fact gone to Vancouver with L. He says he messaged the respondent on Instagram requesting that she return to Denmark with L., but the respondent refused.
- [11] He then contacted the "Danish Family Agency" who in turn contacted the respondent by telephone. The notes of the investigator are attached to the affidavit of the petitioner and they note that the respondent told the investigator that her move to Canada was with the consent of the petitioner. The respondent, also said that she would never bring L. back.
- [12] On January 17, 2024, the petitioner was awarded temporary sole custody of L. by the Danish court.
- [13] An Article 16 notice under the Hague Convention was filed on February 26, 2024.
- [14] On March 12, 2024, a judicial case conference was held in this matter before Justice Fleming at which counsel for the petitioner and the respondent in person attended. Several orders were made at the judicial case conference, including the setting of dates by which the petition, the petition response, and supporting affidavits were to be filed, and there was also an order made that L. not be removed from the Lower Mainland (the "Fleming Order").
- [15] The petitioner was further given leave to substitutionally serve the respondent by email with pleadings and affidavits.
- [16] The petition was filed on March 26, 2024, as was directed in the Fleming Order. The petitioner's affidavit was, in fact, filed late. The Fleming Order directed that it be filed by March 26, but it was not filed until April 5, 2024. Nevertheless, I am advised that an unsworn copy of that affidavit was provided to the respondent by March 26, 2024.

[17] The Fleming Order directed that the petition response and supporting affidavits be filed by April 12, 2024. Despite that order, the respondent has not filed a petition response, nor has she filed any affidavits. The respondent nevertheless, as I indicated, appeared at this hearing and during the course of her submissions, it immediately became apparent that she was providing this court with evidence. Therefore, I directed that she be affirmed so that she could give evidence.

[18] In summary, she testified that:

- a) L. does not speak Danish, does not have a Danish passport, and that he cannot be sent to Denmark without a visa.
- b) The petitioner rarely exercised his parenting time and she said that L. does not know his dad.
- c) There was an agreement with the petitioner that she and L. would move to Canada.

Hague Convention

[19] Pursuant to s. 80 of the FLA, the Hague Convention has the force of law in British Columbia.

[20] The objectives of the convention are set out in Article 1 and are "to secure the prompt return of children wrongfully removed to or retained in any contracting state" and "to ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting states."

[21] It is undisputed that Denmark is a contracting state to the Hague Convention.

[22] Article 3 provides that the removal of a child is wrongful where it is in breach of the rights of custody, either sole or joint, under the laws of the state where the child was habitually resident, and at the time of removal, those rights were actually exercised.

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.

- [23] There is no doubt but that on the evidence before me, L. was habitually resident in Denmark before his removal to Canada. Although the respondent testified and submitted that L. does not speak Danish, this is contradicted by the petitioner and, in any event, it is clear that L. has lived his entire life in Denmark. Denmark was clearly his habitual residence in December 2023.
- [24] The evidence before me also clearly satisfies the requirement that the petitioner had rights of custody. The October 13, 2022, order of the Danish court in Sonderborg is proof of this.
- [25] I take the respondent's submissions as challenging whether the petitioner actually exercised his custodial rights.
- [26] The petitioner deposed that he exercised his parenting time on many weekends and for longer periods during holidays. The respondent testified that the petitioner was essentially an uninterested parent. However, it was unclear from her evidence and submissions exactly how often the petitioner exercised parenting time and over what period. She did concede that he exercised some parenting time.
- [27] On balance, I am satisfied that the petitioner exercised his rights of custody at least periodically prior to the departure of the respondent and L. from Denmark. Accordingly, I am satisfied that the removal of L. from Denmark and his retention in Canada is wrongful within the meaning of Article 3 of the Hague Convention.
- [28] Article 12 of the Hague Convention provides that where a child has been wrongfully removed and less than one year has elapsed from the date of removal, "the authority concerned shall order the return of the child forthwith". There is no discretion under Article 12 of the Hague Convention.

Article 12. Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

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 proceeding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

[29] However, Article 13 of the Hague Convention provides limited exceptions to the requirement that the child be returned forthwith. To paraphrase the exceptions, they are: (1) where the person was not actually exercising custody or had consented or acquiesced in the removal of the child; (2) where there is a grave risk that the child would be exposed to harm or placed in an intolerable situation if returned; and (3) if the child objects to being returned and is of such an age that it is appropriate to take into account the child's views.

Article 13. Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

- a. The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- 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.

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 account of its views. In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

[30] Based on the evidence and submissions of the respondent, I take it that she says the exception concerning where the person "was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention" is an exception that applies in the circumstances.

[31] I have addressed this, in part, above and have found that the petitioner was exercising his custodial rights before the removal of L. from Denmark. However, the respondent also says the petitioner consented to the removal of L. from Denmark. I do not accept this submission or the respondent's evidence in this regard.

[32] First, the petitioner has deposed that he did not consent to L.'s removal.

[33] Second, the petitioner's conduct gives rise to a strong inference that he never consented to such a move. He immediately took steps to have L. returned once he learned he had been removed from Denmark to Canada. This is completely inconsistent with an agreement that the respondent could emigrate to Canada with L.

[34] To the extent that the respondent relies upon L.'s views, I do not have any evidence from L. of his views. Moreover, given L.'s young age, I have serious doubts as to whether his views should be taken into account.

[35] In the result, I am satisfied that L. has been wrongfully removed from Denmark, his habitual place of residence, and he must be returned to Denmark forthwith.

"Giaschi J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/24/09/2024BCSC0912.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/jalili-v-bakhshizad-2024>

Prepared on 26 October 2026 · Esheria