

CANADA / JUDGMENT

Viltman v. Borovskaia

2022 BCSC 381

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2022 BCSC 381 Viltman v. Borovskaia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Viltman v. Borovskaia,

2022 BCSC 381

Date: 20220304

Docket: E213040

Registry: Vancouver

Between:

Alexander Vaceslavovic Viltman

Petitioner

And

Vera Borovskaia also known as Vera Andreevna Borovskaia

Respondent

Before: The Honourable Justice Mayer

Oral Reasons for Judgment

Counsel for the Petitioner:

C.P. Amundsen

Counsel for the Respondent:

G. Vlug

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 22 and 23, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 4, 2022

Introduction

[1] In this application the petitioner, Alexander Viltman, seeks a declaration that the children of the marriage, E.V., who is currently 3 years old, and O.V. who is currently 1 (the "Children"), were wrongfully retained in Canada by the respondent, Vera Borovskaia on November 3, 2021. Mr. Viltman seeks an order that the Children be returned to Germany pursuant to Canada's international obligations under the Convention on the Civil Aspects of International Child Abduction, 25 October 1980, UNTS 1343 (entered into force in Canada on 2 June 1983; 19 I.L.M. 1501 [Hague Convention]).

Background

- [2] Mr. Viltman is of Russian descent and holds both Russian and German citizenship. Ms. Borovskaia is a Russian citizen. The Children are both German citizens and are also entitled to Russian citizenship. E.V. holds a German and Russian passport and O.V. holds a German passport.
- [3] Mr. Viltman and Ms. Borovskaia met online in March 2016 and were married on July 22, 2016 in Khabarovsk, Russia. Ms. Borovskaia moved to Germany in or around July 2017 and E.V. and O.V. were born in Germany in, respectively, 2018 and 2020.
- [4] Mr. Viltman has a nine year-old son from a previous marriage ("A.V.") who lives with his ex-wife in Germany. Ms. Borovskaia also has a nine-year old son from a previous marriage ("B.B") who now lives with Ms. Borovskaia and her family, including his two half-siblings E.V. and O.V., in British Columbia. Prior to Ms. Borovskaia leaving Germany for Canada with the Children, the parties, the Children and B.B. lived together in Hanover.
- [5] Mr. Viltman alleges that on around October 1, 2021, Ms. Borovskaia told him that she wished to travel to Vancouver to visit her ill parents. He says that he supported a trip for this purpose - so long as the Children returned to Germany by November 1 or 3, 2021 so that E.V. could start kindergarten, which he says was required under German law. Mr. Viltman signed separate travel consent forms for each of the Children to allow them to travel from Germany to Canada, which were dated September 26, 2021. No departure date or return dates were recorded on the consent forms signed by Mr. Viltman.

- [6] Ms. Borovskaia alleges that before she left Germany for Canada that Mr. Viltman agreed that she could relocate to Canada with the Children. On October 16, 2021, Ms. Borovskaia, the Children and B.B. travelled to Vancouver, British Columbia and moved in with her parents.
- [7] On or around November 9, 2021, after she had left Germany with the Children and B.B., Ms. Borovskaia told Mr. Viltman that she was pregnant with their third child, due to be born in June 2022. Mr. Viltman alleges that at that time Ms. Borovskaia told him that she wished to remain in Canada until she gave birth so that the child could have Canadian citizenship, and he agreed that the Children would be returned to Germany by November 14 or 16, 2021. Mr. Viltman alleges that on or around November 12, 2021 Ms. Borovskaia told him that she would not be returning to Germany with the Children.
- [8] On or about November 19, 2021 Mr. Viltman travelled to British Columbia. He says some time between November 10 and 12, 2021, Ms. Borovskaia invited him to come to Canada. Ms. Borovskaia denies making such an invitation.
- [9] When he arrived in Vancouver Mr. Viltman went straight to the residence of Ms. Borovskaia's parents. At that time, he was arrested by police for uttering threats and criminal harassment. He spent the night in jail and was released and then re-arrested when he attempted to contact Ms. Borovskaia, in breach of his release terms. He was again released on conditions including not going near or attempting to contact Ms. Borovskaia, her family or the Children and he returned to Germany on November 24, 2021.
- [10] Mr. Viltman says that he has not had any contact with the Children since on or about October 17, 2021. He filed this petition seeking return of the Children to Germany on December 10, 2021.

Legal Framework

- [11] Article 1 of the Hague Convention states that its object is:
- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
 - b) to ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
- [12] Article 3 of the Hague Convention defines the wrongful removal or retention of a child:

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.

[13] Article 4 of the Hague Convention provides that the convention applies to any child who was "habitually resident in a Contracting State immediately before any breach of custody or access rights" and that "the Convention shall cease to apply when the child attains the age of 16 years."

[14] Article 5 of the Hague Convention defines rights of custody and access:

For the purposes of this Convention -

- a) "Rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- b) "Rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

[15] Canada and Germany are both Contracting States to the Hague Convention and there is no dispute that the Hague Convention had the force of law in BC at the time of the alleged wrongful retention of the children: see Family Law Act, S.B.C. 2011, c. 25, s. 80.

[16] E.V. was three and O.V. was one year old at the time of the alleged wrongful retention. Subject to a determination with respect to habitual residence, the Hague Convention applies in this case.

Analysis on Wrongful Retention and Habitual Residence

[17] In *Ludwig v. Ludwig*, 2019 ONCA 680, the Ontario Court of Appeal applied a two-stage analysis in determining whether a wrongful removal or retention has occurred. The first stage involves two steps. In the first step, the court is to determine the date of the alleged wrongful removal or retention. In the second step, the court is to determine what jurisdiction the child was habitually resident in immediately before the date of the alleged wrongful removal or retention. If a child's place of habitual residence is found to be the country of the applicant, the Hague Convention applies. In the second stage of the analysis, the court is to determine whether any of the exceptions to mandatory return of the child, under Articles 12, 13 or 20, apply: *Ludwig*, at para. 40.

[18] Wrongful retention implies that a parent has taken a child from the place of habitual residence with the permission of another person with custodial rights for a specified period of time and has not returned the child when s/he was supposed to be returned: see Hague Convention, Article 3.

- [19] In this case I find, and there is no dispute in this respect, that Ms. Borovskaia travelled from Germany to Canada with the Children with the permission of Mr. Viltman. Accordingly, this case raises the question of wrongful retention and not wrongful removal.
- [20] Mr. Viltman alleges that it was his expectation that the Children would be returned to Canada in time for E.V. to commence kindergarten on November 3, 2021. As a result, I find that the date of the alleged wrongful retention of the Children in Canada is November 3, 2021. I note that at this stage, identifying this date does not imply a finding of wrongful retention but provides a date to be used in the analysis of habitual residence: see Ludwig, at para. 25.
- [21] Habitual residence is not defined in the Hague Convention. In *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 at para. 42 [Balev], the Supreme Court of Canada confirmed that in determining habitual residence under Article 3 courts must look to all relevant considerations arising from the facts and not focus on either parental intention or the child's acclimatization to a particular place.
- [22] The Supreme Court of Canada clarified that the appropriate test for determining habitual residence is the hybrid approach, which the Court described at para. 43:
- [43] On the hybrid approach to habitual residence, the application judge determines the focal point of the child's life -- "the family and social environment in which its life has developed" -- immediately prior to the removal or retention. The judge considers all relevant links and circumstances -- the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B.
- [23] The Supreme Court of Canada stated that applicable considerations include "the duration, regularity, conditions and reasons for the child's stay in the territory of a member state and the child's nationality," although no single factor is determinative, and the application judge must consider the entirety of the circumstances: *Balev* at para. 44, referring to *Mercredi v. Chauffe*, C-497/10, [2010] E.C.R. I-14358 at para. 56.
- [24] Further, the Supreme Court of Canada commented that considerations may vary according to the age of the child concerned. For example, in the case of an infant, consideration may be given to factors including by whom the child is primarily cared for: *Balev* at para. 44.
- [25] Finally, the Supreme Court of Canada confirmed that pursuant to Articles 3 and 4 of the Hague Convention, habitual residence is determined immediately prior to the wrongful removal or retention: *Balev* at para. 67.

- [26] In this case, the Children both have German citizenship and were born and raised in Germany. There is no evidence that the Children spent any significant time outside of Germany prior to the date of their alleged wrongful retention in Canada - November 3, 2021. In fact, just prior to this time, they had been in Canada for a period of approximately two weeks.
- [27] The evidence establishes to my satisfaction that the focal point of the Children's life prior to travelling to Canada with their mother in mid-October was in Germany. E.V. has attended kindergarten in Germany since August 2019, which prior to her alleged wrongful retention in Canada, was scheduled to restart on November 3, 2021. O.V. at just over one-year old, has not commenced school at this time. Both Children have a family doctor in Hanover.
- [28] Although the Children were in British Columbia for approximately two weeks prior to November 3, 2021, there is no evidence that they developed substantial links to the province during this time. The fact that the Children's maternal grandparents and uncle reside in Canada does not by itself establish a link to Canada. If there was evidence that the Children's grandparents and uncle have always been a part of the Children's daily lives, such as by caring for or visiting with them, I might have found otherwise. Finally, I note Mr. Viltman's evidence, and there is nothing to contradict this, that the Children and Ms. Borovskaia remain in Canada on temporary visas which are set to expire in April 2022.
- [29] Links made by the Children to Canada after November 3, 2021 are not to be considered in determining place of habitual residence. As was made clear in *Balev* at para. 67, it is only the period of time prior to the date of wrongful retention that a child's links to a new country are considered for the purposes of determining habitual residence. Further, as was stated in *Knight v. Gottesman*, 2019 ONSC 4341 at paras. 33-37, where one parent has agreed to a time-limited move to another country, the court can consider the child's circumstances in that country--but not the circumstances after the alleged wrongful removal or retention: *De Oliveira v. Campbell*, 2019 BCSC 623 at para. 40.
- [30] I find that the Children were habitually resident in Germany on November 3, 2021 and were wrongfully retained in Canada on that date.

Breach of Custody Rights

- [31] Under Article 3 of the Hague Convention, it is necessary to determine whether Mr. Viltman's custody rights under the laws of Germany have been breached as a result of Ms. Borovskaia wrongfully retaining the Children in Canada. It is also necessary to determine whether Mr. Viltman was exercising custody rights at the time of the alleged wrongful retention.
- [32] Article 5 of the Hague Convention provides that "rights of custody" must include "rights relating to the care of the person of the child and, in particular the right to determine the child's place of residence."

[33] I am satisfied that Mr. Viltman had custody rights under German law. In this respect, I refer to the evidence tendered by Mr. Viltman from Eva Rehberg-Friedrich who provided an opinion that at the time of the children's "abduction" and to this day, both parents had custody rights under German Law. I am also satisfied Mr. Viltman was exercising or had the right to exercise custodial rights prior to the Children's removal. At that time the Children lived with both parties and Mr. Viltman performed custodial duties such as taking E.V. to school.

Mandatory Return

[34] Under Article 12 of the Hague Convention, if less than one year has passed between the date of the wrongful retention and the commencement of proceedings, then the return of the child is mandatory--subject to the exceptions in Articles 13 and 20 which are discussed further below.

[35] This proceeding was commenced on December 10, 2021 and as I found above, the Children were wrongfully retained in Canada as of November 3, 2021 at a time when they were well under 16 years old. Accordingly, subject to the exceptions in Articles 13 or 20 of the Hague Convention applying, it is mandatory for this Court to order that the Children be returned to Germany.

Exceptions Analysis

[36] Article 13 of the Hague Convention provides two exceptions to the mandatory requirement, set out in Article 12, for return of a child to their country of habitual residence. Article 13 reads as follows:

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.

Did Mr. Viltman consent to the Children remaining in Canada?

- [37] As I have already stated, Ms. Borovskaia contends that Mr. Viltman consented to her taking the Children to Canada on a permanent basis and therefore remaining in Canada with the Children does not constitute a wrongful retention. During submissions counsel for Ms. Borovskaia confirmed that Ms. Borovskaia is not alleging that Mr. Viltman acquiesced to the Children remaining in Canada after the date of their alleged wrongful retention, but rather that he provided his consent for them to do so, prior to the date of their alleged wrongful retention.
- [38] The applicable exceptions therefore include consent, pursuant to Article 13(a), or alternatively, grave risk of physical or psychological harm or an intolerable situation, pursuant to Article 13(b).
- [39] In order to rely on Article 13(a) of the Hague Convention, Ms. Borovskaia is required to prove "clear and cogent evidence of unequivocal consent or acquiescence" by Mr. Viltman to the retention of the Children in Canada: *C.M. v. J.M.*, 2015 BCSC 2339 at para. 64, referring to *Katsigiannis v. Kottick-Katsigiannis* (2001), 55 O.R. (3d) 456 (C.A.) at para. 49.
- [40] Mr. Viltman denies that he consented to the Children remaining in Canada.
- [41] Ms. Borovskaia asks this Court to infer that consent was provided by Mr. Viltman from his signature on open-ended travel authorization forms allowing the Children to travel from Hanover to Vancouver and from the exchange of text messages between the parties, in which the parties discussed the circumstances of Ms. Borovskaia's travel to Canada.
- [42] I do not consider that the travel authorizations signed by Mr. Viltman constitute evidence of consent. I note that the travel authorizations are entitled "Consent for a child travelling without parents". The documents do not include a departure date or return date. In my view the travel authorization is simply that, an authorization for the Children to fly to Canada - and not evidence of consent by Mr. Viltman for them to remain in this country.
- [43] Ms. Borovskaia relies on text message and voicemail exchanges between May and late October 2021.
- [44] Ms. Borovskaia has provided a transcript of a voicemail message from Mr. Viltman (which includes the handwritten date of "May 2021" at the top) which reads as follows:

Alexander: All right, darling, go, well, as far as I understand your parents are giving you the money to move and for all necessary like plan, shipping the belongings, so talk to them so they can pay it for you and all the children accordingly. [O.V.] of course, needs a consent to travel, I understand that with the Corona you re fucked up to enter, so you will have to do the tests or getting vaccines for all. Perhaps they do not allow entry at all. But I understand that your parents will organize everything for you. Good luck to you.

[45] In an undated text message, which I have assumed from the context was exchanged in late September 2021, Mr. Viltman made the following comment:

Alexander: Ask grandmother to pay for your move to Canada and for the support of your kids. Canadian dollars are growing on trees three while here every euro is a battle.

[46] In a voicemail message sent September 29, 2021 Mr. Viltman stated:

And then, I did not understand why you need insurance if you are leaving to Canada for good? What's freaking insurance? Just do it there.

[47] In a text message, sent in October 2021, Ms. Borovskaia alleges that Mr. Viltman wrote to her advising that he had a new girlfriend. She submits that this indicates that he had moved on with a new relationship.

[48] With respect to the exchange of text and voicemail messages between the parties prior to November 3, 2021, I do not find that these text messages provide clear and cogent evidence that Mr. Viltman consented to the Children remaining in Canada. Although it appears that a move to Canada was contemplated the exchanges do not establish, by clear and cogent evidence, that the parties had agreed that the Children would relocate to Canada.

[49] As well, text and voicemail messages exchanged after November 3, 2021 do not suggest that Mr. Viltman had previously consented to the Children relocating to Canada. These exchanges include the following:

- a) Text messages exchanged on or about November 9, 2021 which suggest that Ms. Borovskaia had agreed to return to Germany by November 16, 2021;
- b) A text which appears to have been sent on November 10, 2021 in which Ms. Borovskaia wrote "[b]ut maybe then you will pick them up now? [B.B.] and I will stay and give birth normally (in Canada)" and Mr. Viltman responded "Will you bring them (children to Germany)? I will never fly to Canada after your parents and petka (Petr) betrayed me";
- c) A text message exchange on November 11, 2021 in which Ms. Borovskaia wrote "I suggested an option - I stay here to give birth, you take two children" to which Mr. Viltman replied, "[y]ou have to fly in otherwise I'll lose you" and "you can fly there [I have assumed "there" is Canada] at least every month".

- [50] I also note, as Mr. Viltman submits is relevant, that the Children and Ms. Borovskaia entered into Canada on six-month visas and there is no evidence that Ms. Borovskaia has made attempts to obtain the right to reside here. In addition, at the time of their departure from Germany, Ms. Borovskaia and the Children took very few items with them - consisting of two bags - and left the Children's toys, clothes and pictures. This and the exchanges of communication included above do not suggest that the parties had agreed that Ms. Borovskaia and the Children would remain in Canada after November 3, 2021.
- [51] In conclusion, I do not find that Ms. Borovskaia has proven, by clear and cogent evidence, that Mr. Viltman provided unequivocal consent for the Children to remain in Canada on an indefinite basis.
- [52] Given the Children's young age, it is not appropriate for this Court to consider their preference to remain in Canada.

Is there a grave risk of the Children experiencing physical or psychological harm or an intolerable situation if they are returned to Germany?

- [53] Ms. Borovskaia contends that even if consent for the Children to remain in Canada is not made out, that pursuant to Article 13(b) of the Hague Convention, this Court should decline to order their return to Germany as doing so will place them at grave risk of physical or psychological harm or in an intolerable situation.
- [54] In *Thomson v. Thomson*, [1994] 3 S.C.R. 551, the Supreme Court of Canada confirmed that in the context of a Hague Convention application Canadian courts are not to consider the best interests of a child in the same manner as in a custody hearing--as is made clear in Article 16 of the Hague Convention: *Thomson* at 553.
- [55] Article 16 provides that courts "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention".
- [56] More recent decisions of this Court have confirmed that the best interests of the child test is not to be applied in determining whether a return under the Hague Convention should be ordered: e.g., *Medina v. Pallett*, 2010 BCSC 259 at para. 44.
- [57] Although the best interests of the child test is not to be applied, a child's interests are not irrelevant for all purposes under the Hague Convention, including determining the risk of exposure to physical or psychological harm or an intolerable situation under Article 13(b). A parent's irresponsibility and unreliability and other matters may be considered: see *Medina* at para. 48 citing *Matzke v. Matzke*, 2009 BCSC 1532; *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485 (C.A.) at paras. 6, 28, 31 to 33, and *Thomson*.
- [58] Writing for the majority in *Thomson*, Justice La Forest stated that physical or psychological harm is harm to a degree that also amounts to an intolerable situation: *Thomson* at 596. The question is whether a respondent has produced enough evidence to satisfy the Court that a child is at grave risk of harm if returned to their place of habitual residence. The respondent

is required to produce evidence which is both "credible and meets a high threshold," and must prove that the courts of the place of the child's habitual residence cannot protect the child from alleged harm: Medina at para. 49, referring to D.Z. v. J.Z. (1994), 99 B.C.L.R. (2d) 287 (S.C.) at paras. 10, 27; K.J.G. v. K.J.B., [2000] A.J. No. 290 (Ct. of Q.B.) at para. 92.

Evidence Concerning Grave Risk of Harm or an Intolerable Situation

- [59] In this petition Ms. Borovskaia makes a number of serious allegations which she contends give rise to a grave risk of harm, or may result in an intolerable situation, if the Children are returned to Germany. Her allegations include family violence, including previous sexual assaults against her, which she alleges were carried out in front of one or more of the children, sexual assault (touching) of B.B., and psychological abuse including threatening behaviour (including that directed to her and her family when Mr. Viltman came to Canada in November 2021) and extremely controlling behaviour over her finances and social life.
- [60] In support of her allegations that Mr. Viltman is not a suitable parent, Ms. Borovskaia alleges that investigations into alleged criminal conduct are being carried out both in Canada and Germany. As well, Ms. Borovskaia alleges that Mr. Viltman is a racist and is teaching the Children to hate members of minority groups. As well, Ms. Borovskaia alleges that Mr. Viltman is mentally unstable and has recently threatened suicide and is therefore incapable of caring for the Children.

Alleged Sexual Assaults

- [61] Ms. Borovskaia alleges that Mr. Viltman repeatedly sexually assaulted her during their relationship. During submissions counsel for Ms. Borovskaia took the Court to a transcript of an audio recording, which Ms. Borovskaia alleges is evidence of a sexual assault which occurred while the parties remained together in Germany. Having reviewed this transcript, it is unclear to me if Mr. Viltman assaulted Ms. Borovskaia or if he was simply trying to convince her to have sex with him.
- [62] I have not been taken to any evidence which establishes the police in Germany are carrying out an investigation into any alleged sexual assaults which occurred in that country - although the evidence indicates that Ms. Borovskaia has made a complaint against him.
- [63] With respect to any suggestion that Mr. Viltman also sexually assaulted his ex-wife Olga, Mr. Viltman has provided evidence in the form a text message or email from Olga, in which she denies that she was assaulted.
- [64] Mr. Viltman denies that he has ever sexually assaulted Ms. Borovskaia, or his ex-wife Olga, or B.B. Other than her assertions that Mr. Viltman repeatedly sexually assaulted her there is no objective evidence that the sexual assaults alleged by Ms. Borovskaia occurred. As I have said, the audio transcript of one alleged incident of sexual assault is inconclusive. I wish to be clear, this is not to say that I disbelieve Ms. Borovskaia's allegations, but I simply do not have sufficient evidence on which I can decide whether it is likely that if the alleged sexual

assaults occurred.

- [65] With respect to the alleged sexual assault of B.B. by Mr. Viltman, consisting of sexual touching, the evidence tendered in this respect comes only from Ms. Borovskaia and has not been substantiated by satisfactory objective evidence. There is some speculative evidence from Ms. Borovskaia's parents which I do not find to be overly helpful. Again, it is not that I disbelieve Ms. Borovskaia's allegations but I simply do not have sufficient evidence on which I can conclude that it is likely that the alleged sexual assault of B.B. occurred.
- [66] There is some objective evidence which supports an inference that Mr. Viltman has not abused the Children or B.B. I will address this evidence later in my reasons.

Alleged Controlling or other Inappropriate Behaviour

- [67] Ms. Borovskaia has provided evidence summarizing a variety of abusive behaviour by Mr. Viltman, in addition the allegations of sexual abuse set out. This includes allegations of psychological abuse including repeated insults and controlling behaviour both in terms of Ms. Borovskaia's financial autonomy and social life.
- [68] Ms. Borovskaia's parents have sworn affidavits in which they attest to Mr. Viltman's controlling and abusive behaviour and use of racist, sexist or other derogatory terms when referring to others. These affidavits contain troubling descriptions of Mr. Viltman's behaviour around the children and to Ms. Borovskaia.
- [69] Although Mr. Viltman denies much of this behaviour there is objective evidence upon which I can conclude that Mr. Viltman has conducted himself in a manner which can be described as family violence. The evidence suggests that he has controlled Ms. Borovskaia's finances. There is evidence that Mr. Viltman used racist or derogatory language to refer to people with racial backgrounds or different gender orientations around the Children. After the date of wrongful retention of the Children in Canada Mr. Viltman sent messages in which he suggested that he may commit suicide, or that Ms. Borovskaia may be incarcerated if she did not return to Germany, or that the Children may be placed in an orphanage if both parents are incarcerated. Most serious is Mr. Viltman's threat to attend at the home of Ms. Borovskaia's parents, which he implied could result in tragedy.
- [70] All of this behaviour can be described as reprehensible and a best interests of the child analysis in this country might well result in Mr. Viltman being denied parenting time or only receiving parenting time on various conditions - including under supervision. But as is made clear in the Hague Convention this Court is not to determine custody rights when a return of a child to a member state is sought: Hague Convention Articles 16 and 19. It is not open to this Court to apply a best interests of the child analysis: Medina, para. 44

Alleged Investigations Into Mr. Viltman's Conduct

- [71] Evidence provided from third parties does not support Ms. Borovskaia's contention that returning the children to Germany will result in the children being subjected to a grave risk of physical or psychological harm or an intolerable situation.
- [72] There is evidence establishing that in November 2021 Ms. Borovskaia and her parents consented to a one-month Safety Plan under which they agreed not to allow Mr. Viltman to have access to the Children. A letter from the Ministry of Children and Family Development sent December 29, 2021 referenced reports having been made of physical discipline, verbal abuse and threats. It is noteworthy that the MCFD letter does not refer to complaints of sexual abuse of Ms. Borovskaia or of B.B. by Mr. Viltman. At that time MCFD indicated that it was closing its "protection file" and opening a "support file".
- [73] With respect to the status of investigations into Mr. Viltman's conduct in Germany, there is evidence establishing that Ms. Borovskaia has made a complaint to the German police in Hanover, which has been referred to a public prosecutor. I am not sure about the precise nature and status of any potential investigation. Mr. Viltman has provided evidence that he does not have a criminal record in Germany.
- [74] With respect to criminal charges in Canada, the evidence establishes that Mr. Viltman was charged with one count of breaching his release conditions after he was arrested on November 19, 2021. There is no evidence that charges have been laid for the alleged incidents of uttering threats or criminal harassment.

Positive Reports of German Social Workers, Doctors and German Court

- [75] Mr. Viltman has provided evidence consisting of a report by a German social worker prepared after her attendance at the parties' residence in Hanover on June 9, 2021. Mr. Viltman says that the genesis of this report was a complaint by either a neighbour (or their landlord) concerning noise - and was likely an attempt to have the parties evicted from their rental home. Although the report is brief, the writer, Ms. Gladkich, reports that in the view of the municipal social services agency in Hanover, no child welfare endangering circumstances were noted during the visit.
- [76] Mr. Viltman also produced a medical opinion dated June 18, 2021, from Dr. Bernert, the Children and B.B.'s pediatrician. Dr. Bernert reported that there were no indications of injuries and that the "parent-child relationship is trusting" for each of the Children and B.B.
- [77] Finally, Mr. Viltman produced a judicial order, issued by the Braunschweig District Court in or about February 2021, in which the court approved a consent order allowing Mr. Viltman to see A.V. The consent order, consented to by Mr. Viltman and his ex-wife Olga, allowed Mr. Viltman parenting time, including overnight visits with A.V.

Conclusion on Grave Risk of Physical or Psychological Harm or an Intolerable Situation

- [78] After considering all of the available evidence, I do not find that Ms. Borovskaia has satisfied the high burden of demonstrating grave risk that the Children will be subjected to physical or psychological harm or an intolerable situation if this Court orders their return to Germany.
- [79] The evidence with respect to family violence, including physical and psychological violence which Ms. Borovskaia alleges she has experienced at the hands of Mr. Viltman is inconclusive. Although Ms. Borovskaia's allegations are serious, based on the available objective evidence, I am not satisfied that the Children are at grave risk of physical or psychological harm, including psychological harm as a result of seeing family violence directed towards their mother.
- [80] There is evidence that Mr. Viltman expressed suicidal thoughts but there is no evidence that he has ever, or will attempt suicide in front of the Children. The facts suggest that Mr. Viltman would benefit from psychological counselling but this does imply that he should not be around the Children.
- [81] Further, the evidence indicates that Mr. Viltman has expressed racist or discriminatory views around the Children. To the average person some of Mr. Viltman's comments would likely be considered shocking. I am not satisfied, on the evidence, that Mr. Viltman has sought to influence the Children with racist or discriminatory views in a manner that constitutes a grave risk of harm or an intolerable situation.
- [82] The circumstances of this case are not analogous to those considered in *Pollastro* in which the court determined that there was substantial and irrefutable evidence of the father's unreliability, drug use, and uncontrollable violence towards the mother resulting in a finding of grave risk of harm. Similarly, the facts of this case are not analogous to those in *J.H.F. v. S.H.F.N.*, 2015 BCSC 349 at paras. 27, 32-35, 47 and 48, in which there were numerous affidavits providing objective evidence of the risk of harm to a child, including a report from a child psychologist which provided evidence with respect to observations of family violence. As well, the facts of this case are not analogous to those in *Wigley v. Hares*, 86 So (3d) 932 (Fla Dis Ct App 2011) at 938, where there was evidence that the father, who sought return of a child, had threatened to kill the child.
- [83] As was found in *L.P.B. v. M.R.G.*, 2018 BCSC 1275, I presume that a highly developed legal system, such as that in Germany, can make orders to protect the Children if a judge is persuaded of the basis for such orders: *L.P.B.* at para. 38, citing *Sampley v. Sampley*, 2015 BCCA 113 at paras. 38-41. This presumption is supported by the evidence of German counsel, Eva Rehberg-Friedrich. Ms. Rehberg-Friedrich provided an opinion that if the Children are returned to Hanover, the youth welfare office will contact Mr. Viltman and assess the situation of the Children in his household. Further, Ms. Rehberg-Friedrich's opinion is that if the youth welfare office forms an impression that the Children's welfare is

at risk they will appeal to family court, which court will then decide if Mr. Viltman's parental responsibilities should be restricted or withdrawn.

- [84] In conclusion, I do not find that Ms. Borovskaia has met her burden of proof to show that there is a grave risk of the Children being exposed to physical or psychological harm or an intolerable situation, such that this Court should use its limited discretion under Article 13(b) of the Hague Convention to refuse to order their return to Germany.

Human Rights and Fundamental Freedoms

- [85] Article 20 of the Hague Convention provides that a court may refuse to order the return of a child if this would not be in the "fundamental principles of the requested state", in this case, Canada, "relating to the protection of human rights and fundamental freedoms."
- [86] Ms. Borovskaia has not led any evidence in this petition to support a refusal under Article 20.

Proposed Undertakings

- [87] Mr. Viltman has sworn that he is prepared to provide certain undertakings to make it easier for the Children to return to Germany.
- [88] Undertakings can be considered by this Court to ameliorate the negative effects of returning a child to their place of habitual residence: *Suarez v. Carranza*, 2008 BCSC 1187 at para. 55, citing *Finizio v. Scoppio-Finizio* (1999), 46 O.R. (3d) 226.
- [89] Mr. Viltman is prepared to provide the following undertakings:
- a) he will pay for the cost of the Children's return to Germany;
 - b) he will provide financial support for Ms. Borovskaia for up to six months in Germany, including paying for her rent and providing additional funds for her living expenses;
 - c) he will begin and pursue custody proceedings in Germany with reasonable dispatch to determine parenting time, parental responsibilities and guardianship of the Children; and
 - d) pending resolution of German custody proceedings, the Children will remain in Germany pending a final order or agreement regarding their place of residence.
- [90] Although I have doubts as to whether the German courts would enforce undertakings made in this application, the fact that the undertakings were given can be made known to the German courts. I expect that a failure by Mr. Viltman to comply with these undertakings will impact his credibility in proceedings commenced in Germany.

Conclusion

- [91] As was stated by Justice Cole at para. 59 of Medina, citing K.J.G. at para. 100, "[t]he purpose of the Convention is to take away the benefits of abduction by requiring the abducting parent to do what he or she should have done in the first place, fight for custody in the courts of the Child's home." I adopt this statement.
- [92] The Children were wrongfully retained by Ms. Borovskaia in Canada commencing November 3, 2021, interfering with Mr. Viltman's custodial rights, which he was exercising at the relevant time in Germany. These proceedings were commenced within the required one-year period from the time of the Children's wrongful retention in Canada and Ms. Borovskaia has not satisfied the Court that the exceptions in Article 13 or 20 of the Hague Convention apply. As a result, in accordance with Article 12, I order that the Children be returned to Germany by Ms. Borovskaia, and if she refuses to do so, by Mr. Viltman or the agency Cross Country Support.
- [93] I order that Master Elwood's December 10, 2021 non-removal order, prohibiting removal of the Children from the Vancouver Lower Mainland area is vacated. In addition, I order that Mr. Viltman's counsel is permitted to provide the Children's passports to the parent who will be returning the Children to Germany.
- [94] I order that Ms. Borovskaia do all things and execute and deliver all documentation as may be required to return the Children to Germany.
- [95] If Ms. Borovskaia does not comply with the terms of the orders requiring her to return the Children to Germany or to deliver the children to Mr. Viltman or Cross Country Support for this purpose, any peace officer having jurisdiction in BC shall locate and apprehend the Children and deliver them to Mr. Viltman or Cross Country Support for the purposes of their return to Germany. For the purpose of locating and apprehending the Children, police officers may enter and search any place where they have reasonable and probable grounds for believing the Children are present.
- [96] The undertakings which Mr. Viltman has proposed, set out at para. 89 of these reasons, shall be incorporated into my order.
- [97] The parties are at liberty to speak to the issue of costs at a date and time convenient to the Court and the parties - with an application for costs to be set down no later than 90 days from the date of this order.

"Mayer J."

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