

CANADA / JUDGMENT

Zahariev v. Zaharieva

2025 BCCA 35

COURT

British Columbia Court of Appeal

DECIDED

27 January 2025

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2025 BCCA 35 Zahariev v. Zaharieva

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Zahariev v. Zaharieva,

2025 BCCA 35

Date: 20250127

Docket: CA50186

Between:

Filip Lyudmilov Zahariev

Appellant

(Petitioner)

And

Yana Kalinova Zaharieva

Respondent

(Respondent)

Before:

The Honourable Justice Dickson

The Honourable Justice Fleming

The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated

September 6, 2024 (F.L.Z. v. Y.K.Z., 2024 BCSC 1719,
New Westminster Docket E70308).

Oral Reasons for Judgment

The Appellant, appearing in person:

F.L. Zahariev

Counsel for the Respondent:

M. Lokshin

Place and Date of Hearing:

Vancouver, British Columbia

January 14, 2025

Place and Date of Judgment:

Vancouver, British Columbia

January 27, 2025

Summary:

The appellant and respondent are the parents of a child born in Canada shortly after the respondent mother arrived in B.C. The appellant brought an application under the 1980 Hague Convention seeking the "return" of the child to Bulgaria. The chambers judge found the child habitually resident in B.C. by the date of retention and dismissed the appellant's return application. The appellant raises grounds of appeal relating to the assessment of credibility, procedural fairness and ineffective assistance of counsel, and Bulgarian court decisions regarding jurisdiction and the child's habitual residence under the 1996 Hague Convention. The appellant also applies to adduce new evidence.

Held: Appeal and new evidence application dismissed. The chambers judge made no error in assessing credibility. The appellant was not denied procedural fairness due to an absence of cross-examination. Nor could he establish ineffective assistance of counsel. Given the judicial authority of the requested state has primary responsibility for adjudicating applications under the 1980 Hague Convention, the chambers judge appropriately did not rely on the Bulgarian court's initial decision. Nor should the subsequent appeal decision have played a role.

[1] FLEMING J.A.: The appellant and the respondent are the parents of Neva who was born in Canada on May 17, 2023. The appellant appeals the dismissal of his application for an order that Neva be "returned" to Bulgaria forthwith pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can. T.S. 183 No. 35 [1980 Hague Convention] in reasons for judgment indexed at 2024 BCSC 1719 ("Reasons").

Overview

- [2] The Reasons include a thorough review of the background and disputed facts, which I summarize as follows.
- [3] The appellant is a citizen of Bulgaria. The respondent has Canadian and Bulgarian citizenship.
- [4] The appellant is a professional chef. He lived and worked as a head chef in Norway for six years before returning to Bulgaria in 2021 to open a fine dining restaurant on a property he purchased two years earlier. The appellant deposed to investing all his savings and borrowed funds in the project; and the restaurant was a resounding success. The appellant also deposed to sharing positive relationships with his immediate family and being part of a large close-knit extended family in Bulgaria.
- [5] Born in Bulgaria, the respondent moved to Canada at the age of 10 with her mother, step-father and sister. She returned to Bulgaria when she was 19 and lived in a "commune" for 3 years. The respondent also worked successfully in modelling.
- [6] The parties met in 2021 and started living together in October of that year. The respondent worked at the restaurant, where she had signed an employment contract to be an administrator. She became pregnant with Neva in September 2022 and the parties married two months later.
- [7] During her pregnancy, the parties agreed the respondent would travel to B.C. for the birth, which she did, arriving in February 2023. The respondent has remained here since then, living with her mother and step-father. According to the appellant, he and the respondent had also agreed that she and the baby would return to their home in Bulgaria within some months of the birth. In contrast, the respondent deposed that she and the appellant planned to relocate to Canada, returning to Bulgaria only temporarily in the summer or autumn of 2023 to deal with business commitments.
- [8] The respondent provided evidence of discussions with the appellant that included text messages from before and during the pregnancy about moving to Canada and establishing a restaurant here, negative aspects of living in Bulgaria and the possibility of raising a child elsewhere. In response, the appellant deposed these communications were made in moments of frustration and denied they were declarations of his intention. The respondent also relied on other text messages and documentary evidence showing that in March 2023 the appellant applied for permanent resident status in Canada and he pursued the application process for several months. In related text messages, the appellant spoke about intending to do everything possible to open a restaurant here. He also stated "we're definitely not going to live in Bulgaria". In response, the appellant deposed that he was just exploring opportunities and the permanent resident application was the respondent's mother's idea; he did not want the status and he did not think he needed it.

- [9] In addition to his own evidence, the appellant relied on affidavits from four others including: his mother, a business acquaintance, a doctor in Bulgaria, and the respondent's father, with whom she says she does not have a positive relationship. Each deposed to the respondent telling them she was only travelling to Canada to give birth. In response, the respondent characterized some of the alleged discussions as superficial, the interactions as brief or the relationships as not close. She denied telling her father her visit to Canada was temporary. The respondent also relied on similar evidence to the opposite effect, including, for example an affidavit from her uncle deposing that the appellant told him that he wanted to raise his children outside of Bulgaria, and after returning to Bulgaria for a short time with the baby, they planned to go back to Canada.
- [10] The appellant travelled to B.C. in April 2023. After his arrival the parties' relationship deteriorated. The appellant returned to Bulgaria in June 2023 and the relationship continued to deteriorate. He travelled to B.C. again in September 2023 but returned to Bulgaria less than two weeks later. The parties' evidence regarding discussions they had during that time over the respondent's opposition to her and Neva returning or visiting Bulgaria was in conflict. The respondent's evidence included being fearful by September 2023 that if she and Neva went to Bulgaria, the appellant would not let them leave. In his evidence the appellant expressed being hopeful the respondent would reconsider, including when he came to B.C. again in January 2024. But the visit was a difficult one and the parties met for the last time in early February 2024.
- [11] In terms of Neva's circumstances, the appellant obtained Bulgarian citizenship for her. The appellant's mother tried to have remote contact with Neva and initiated respectful communications with the respondent expressing her love for both of them and sadness over the separation.
- [12] The respondent deposed to being Neva's primary caregiver although she has also had the respondent's mother, step-father, sister, long-time family friends and the respondent's circle of friends in her life. Neva also participates in a community program. The respondent works part time as a hair dresser and is enrolled in a business program at SFU.
- [13] In February 2024, on notice to the appellant, the respondent applied for a protection order in the Provincial Court of British Columbia. The parties alleged conflicting circumstances for and against the protection order. The application was dismissed but an order was made that Neva not be removed from the Lower Mainland.
- [14] A short time later the appellant filed a claim for divorce and custody of Neva along with other relief in the Bulgarian Regional Court. The respondent filed a response arguing the Regional Court lacked jurisdiction, and making alternative submissions about custody.

- [15] On March 20, 2024, the Regional Court declined jurisdiction finding custody issues derive from a child's habitual residence and Neva was habitually a resident in Canada, based on the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measure for the Protection of Children [1996 Hague Convention]. The appellant appealed to the District Court of Bulgaria.
- [16] The appellant initiated his return application under the 1980 Hague Convention on May 14, 2024 by contacting the Central Authority. The Supreme Court was notified on June 7, 2024.
- [17] His appeal to the District Court had not been decided when the Reasons were issued on September 17, 2024, although the judge was aware of the pending appeal and had received the Regional Court decision.
- [18] On September 20, 2024, the District Court allowed the appeal and found Neva habitually resident in Bulgaria, also identifying the 1996 Hague Convention as the applicable law. It is not clear that the District Court considered the Reasons. While there is evidence they were sent to the District Court in English on or about September 18, 2024, the appeal decision does not refer to them.

Legal Framework

1980 Hague Convention

- [19] Canada and Bulgaria are contracting parties to the 1980 Hague Convention, which has the force of law in B.C. pursuant to s. 80 of the Family Law Act, S.B.C. 2011, c. 25.
- [20] The objects of the 1980 Hague Convention, set out in Article 1, 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 of access under the law of one Contracting State are effectively respected in the other Contracting States".
- [21] Related to the first object, prompt return, Article 2 requires contracting states to "use the most expeditious procedures available" to secure the implementation of the 1980 Hague Convention's objects. Article 11 specifically requires judicial authorities of the contracting states to "act expeditiously in proceedings for the return of children". Further, if a decision is not made within 6 weeks of the start of the proceeding, the applicant or the requesting state has the right to request an explanation for the delay.
- [22] Under Article 3, the removal or retention of a child is considered wrongful where: (a) it is in breach of rights of custody 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 the removal or retention those rights were actually exercised, or would have been exercised but for the removal or retention.

- [23] If the criteria in Article 3 are met and the return application has been started within one of year of the wrongful removal or retention, subject to the exceptions in Article 13, Article 12 provides that the judicial authority of the contracting state where the child is must order the return of the child forthwith.
- [24] An order for the return of a child under the 1980 Hague Convention is not, however, a custody determination. It is simply an order designed to restore the status quo that existed before the wrongful removal or retention, and to deprive the "wrongful" parent of any advantage that might otherwise be gained by the abduction: *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 [Balev] at para. 24.
- [25] In determining whether there has been a wrongful removal or retention of a child under Article 3, the court first determines where the child was "habitually resident" immediately before the removal or retention. If the child's habitual residence is not in the state of the parent seeking return, then the 1980 Hague Convention does not apply: *Balev* at para. 36. As the judge observed, identifying the date of the wrongful removal or retention does not imply a finding the removal or retention was actually wrongful. Instead the date provides an anchor for the habitual residence analysis: see *Ludwig v. Ludwig*, 2019 ONCA 680 at paras. 24-25.
- [26] The 1980 Hague Convention does not define habitual residence. In *Balev*, the Court adopted a "hybrid approach" to determining habitual residence. "Fact-bound, practical and unencumbered with rigid rules, formulas or presumptions" the hybrid approach requires the judge to determine the focal point of the child's life -- that is, the family and social environment in which the child's life has developed -- immediately prior to the removal or retention: at para. 43. All relevant circumstances should be considered, and no single factor dominates the analysis: at para. 44. The circumstances of the parents, including their intentions, may be an important consideration, particularly in the case of young children. However, the role of parental intention in determining habitual residence "depends on the circumstances specific to each individual case": at para. 45. There is no rule that the actions of one parent cannot unilaterally change the habitual residence of a child: at para. 46.

1996 Hague Convention

- [27] As indicated, the Bulgarian courts applied the 1996 Hague Convention in determining jurisdiction and Neva's habitual residence.
- [28] Canada signed the 1996 Hague Convention on May 25, 2017. Bulgaria has ratified it but Canada has not, which also means the 1996 Hague Convention does not have the force of law in this country.
- [29] Article 50 of the 1996 Hague Convention states that it does not affect the application of the 1980 Hague Convention, which also notes that nothing precludes provisions of the 1996 Hague Convention from being invoked "for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights."

- [30] The explanatory report on the 1996 Hague Convention provides that Article 50 serves as an extension of the primacy of the 1980 Hague Convention declared in Article 34. It sets out that the 1980 Hague Convention takes priority over the 1961 Hague Convention, which the 1996 Hague Convention replaced (Lagarde P., Explanatory report on the 1996 Hague Convention, tome II, Protection of children).
- [31] Significantly, Canadian authorities establish that the responsibility for adjudicating 1980 Hague Convention applications lies with the state to which the child has been removed or the requested state. Although the appellant reads the case differently, this was the conclusion in *Pitts v. De Silva*, 2008 ONCA 9 at paras. 35-37, which *Balev v. Baggott*, 2016 ONCA 680 [*Balev ONCA*] affirmed at paras. 65-67.

Proceeding by Petition

- [32] Further to the object of prompt return and the requirements for expeditious procedures and proceedings in the 1980 Hague Convention, the B.C. Supreme Court's practice direction (FPD-16, effective March 1, 2021) and R. 3-1(2.2) of the Supreme Court Family Rules, B.C. Reg. 169/2009, require return applications to be brought by petition. Petition proceedings are a form of summary proceeding heard in chambers based on affidavit evidence, although the chambers judge has a discretion to order cross-examination (R. 10-3(1) and (4) and R. 17-1(18)).

The Reasons

- [33] In the Reasons, the judge identified the main issues on the appellant's return application as: (i) the date on which Neva was wrongfully retained; and (ii) where she was habitually resident immediately prior to that date.
- [34] The judge observed each party relied on numerous affidavits from themselves, family members and friends that were "often" in conflict.
- [35] Commenting that neither party sought cross-examination, the judge explained that contemporaneous written communications and other documents assisted "considerably" in resolving the material factual disputes and she found she could decide the issues.
- [36] The judge also found some of the evidence inadmissible, including evidence tendered for the sole purpose of contradicting another witness' evidence concerning a collateral matter.
- [37] Following a detailed discussion of the relevant evidence, the judge assessed the conflicting evidence. She identified the contemporaneous written communications and documents as providing a consistent objective narrative against which to assess the parties' conflicting evidence, in particular. Placing weight on those materials, the judge accepted each party's evidence only in part, explaining: "[w]ith the benefit of written communications, a likely version of events emerges, and it is closer to the respondent's version than that of the petitioner, the main difference being the firmness of their future plans" (at para. 102).

- [38] The judge placed little weight on the affidavit evidence of some of the third parties regarding discussions with the parties about their plans, including the evidence of the respondent's uncle.
- [39] Ultimately the judge found the parties intended to relocate to Canada and raise Neva here but not to the exclusion of living some parts of the year in Bulgaria, given the unknowns and their business interests there such as the restaurant.
- [40] Based on her assessment of the evidence and the applicable law, the judge concluded the wrongful retention date was September 30, 2023.
- [41] Turning to the issue of where Neva was habitually resident by that date, the judge outlined the hybrid approach to habitual residence established in *Balev*, including key aspects of the Court's discussion of parental intention and cases involving infants or young children. The judge set out the requirement to determine the focal point of Neva's life, being the family and social environment in which her life had developed, based on considering all relevant links and circumstances. Then she engaged in a detailed analysis of the evidence related to Neva's links to and circumstances in Bulgaria; the circumstances of her birth and retention in B.C.; and her links to and circumstances in B.C.
- [42] Following her analysis, the judge concluded that immediately prior to September 30, 2023, Neva's habitual residence was B.C., which she explained as follows:
- [115] This was the jurisdiction in which her life was focused and in which her family and social environment had developed. Her links to Bulgaria were not significant. She has never been to Bulgaria and her parents' intentions were at least that she be born in Canada, along with a desire to relocate to Canada, but not necessarily to the exclusion of living in Bulgaria for periods of time. Given the uncertainty regarding how exactly the parties' plans would unfold, I put some weight on the parties' intentions, but not significant weight. In contrast all of N.Z.'s in-person connections with those who care for her regularly are in BC, and this weighs significantly in the balance.
- [43] Having concluded Neva was habitually resident in B.C., by the date of the retention, the judge dismissed the appellant's petition.

Issues

- [44] The appellant identifies a number of issues in support of his overall position that the judge erred in finding Neva habitually resident in Canada. Asserting that credibility is the cornerstone of the 1980 Hague Convention, he emphasizes the judge erred in her assessment of credibility. Related to this, he alleges procedural unfairness and ineffective assistance of counsel based on the absence of cross-examination. Also related to credibility, he applies to adduce new evidence that includes documents he says establish the respondent was dishonest and attempted to mislead the courts. Other alleged errors include the judge's interpretation of habitual residence and placing undue reliance on Bulgaria's

Regional Court decision, while also asserting judicial comity requires deference to the appeal decision of the District Court.

Discussion

Assessment of Credibility

- [45] The appellant asserts in his factum that the judge did not consider pivotal evidence demonstrating the respondent's credibility issues and history of deception. He refers to newly available documents that are the subject of his new evidence application, including "certified records" from a rehabilitation centre that directly contradict her testimony. The key document is a letter from a rehabilitation centre dated October 9, 2024, that states the respondent was initially admitted as a patient and then became a volunteer ("October Letter"). In her evidence, the respondent had said she was a volunteer, in response to her father's evidence regarding this circumstance.
- [46] The appellant had also produced an earlier version of the same letter before the end of the petition hearing, which is in the record ("August Letter"). The Reasons do not specifically address the admissibility/admission of the August Letter, but it may have been included in the judge's finding that evidence tendered for the sole purpose of contradicting another witness' evidence about a collateral matter is inadmissible.
- [47] The appellant also argues the judge failed to give sufficient weight to other critical evidence of the respondent and her mother, which aligned with his evidence the parties planned to return to Bulgaria after Neva was born. In addition, he points to what he says was a significant shift in the respondent's narrative, as raising serious doubts about her credibility and the authenticity of her stated intentions. Further, he refers to other evidence as overwhelmingly indicating the parties intended to return to Bulgaria, where they had a home, careers and community ties. Regarding other witnesses for both parties, the appellant also complains that the judge failed to adequately weigh their credibility.
- [48] A judge's findings concerning credibility or reliability are findings of fact. The standard of review for findings of fact is palpable and overriding error. Assessment of credibility attracts a high degree of deference on appeal: *R. v. Li*, 2023 BCCA 47 at para. 81. Appellate intervention may be appropriate where the judge's reasons demonstrate an error in principle, or show that credibility has been assessed arbitrarily or using irrelevant criteria: *R. v. S.S.S.*, 2020 BCCA 180 at para. 26. Put differently, if there is a reasonable basis for the judge's findings, an appellate court should not substitute its own view: *R. v. G.F.*, 2021 SCC 20.
- [49] The appellant's arguments reflect a fundamental disagreement with the judge's assessment of the evidence and her findings of fact on the key issues. Essentially, he asks us to interfere based on his views about how she should have approached and weighed the evidence, which is not the role of this Court.

- [50] Before embarking on her assessment of the conflicting evidence related to the material factual disputes, the judge identified that she could accept some, none, or all of the evidence of any witness, here deponents, and the well established factors and approach that guide the assessment of credibility and reliability. Among those factors, and one she found particularly helpful in resolving the factual disputes, is considering whether the evidence was consistent or inconsistent with other independent evidence. In this case, as I have highlighted, that evidence came in the form of contemporaneous written communications and other documents. The Reasons indicate the judge also considered, although less explicitly, other factors such as whether the evidence seems reasonable or plausible and whether it is consistent or inconsistent with related conduct.
- [51] In my view, her assessment of the disputed evidence including the parties' evidence, her acceptance of parts but not all of the evidence of either party, and her weighing of the third party evidence reflects a careful, well reasoned consideration of the whole of the evidence. I am satisfied that her assessment of credibility reveals no error and instead provides a reasonable basis for her findings.
- [52] I would not accede to this ground of appeal.

Procedural Unfairness related to the Absence of Cross-Examination

- [53] The appellant also impugns the Reasons on the basis of procedural unfairness because they were rendered without the benefit of cross-examination.
- [54] The appellant takes the position that credibility is of particular importance not just in this case but in 1980 Hague Convention proceedings generally, indicating there must be cross-examination whenever a return application is contested.
- [55] However, the Supreme Court Family Rules and practice direction require return applications to be adjudicated by petition in conformity with the 1980 Hague Convention's object of prompt return and requirements to use the most expeditious procedures available and decide applications expeditiously. Cross-examination in petition proceedings only occurs where the judge exercises their discretion to permit it.
- [56] The appellant submits that he expressed a willingness to swear his testimony before the judge and be cross-examined, but there was no cross-examination because his then-counsel mistakenly believed it is not permitted in Hague Convention cases.
- [57] This is a claim of ineffective assistance of counsel resulting in an unfair hearing process that made the outcome unsafe.

- [58] Ineffective assistance of counsel has long been recognized as a ground of appeal in criminal cases. To succeed an appellant must establish that counsel's acts or omissions were incompetent; and the incompetence resulted in a miscarriage of justice. An appellant must prove both elements on the balance of probabilities. Further, there is a strong presumption that former counsel's conduct falls within the range of reasonable professional assistance: *R. v. B.(D.G.)*, 2000 SCC 22 at para. 27.
- [59] In the civil context, ineffective assistance of counsel as a ground of appeal is only given effect in the "rarest of cases": *Mediatube Corp. v. Bell Canada*, 2018 FCA 127 at para. 41; *Nguyen v. 1108911 B.C. Ltd.*, 2024 BCCA 48 at para. 36.
- [60] Although in *C.B. v. B.M.*, 2021 ABCA 266, the Alberta Court of Appeal accepted that an appeal of a return order under the 1980 Hague Convention qualified as such a case, it does not appear that this Court has considered ineffective assistance of counsel as a ground of appeal in this context.
- [61] Whether it is available or not, in my view it is clear the appellant could not succeed on this ground. His claim of incompetence is limited to submitting that his former lawyer mistakenly believed cross-examination was not permitted in adjudicating 1980 Hague Convention return applications. The appellant has not provided evidence of this. But even assuming his former lawyer gave this advice and in doing so acted incompetently, there is simply no basis for concluding this incompetence resulted in a miscarriage of justice.
- [62] The appellant has not addressed how the judge erred in exercising her discretion by not ordering cross-examination. But I have already concluded her assessment of the evidence provides a reasonable basis for her factual findings on the material issues. It follows that I am also satisfied that she exercised her discretion appropriately in deciding cross-examination was not necessary to properly assess the conflicting evidence, make the necessary findings of facts and decide the return application.
- [63] The appellant also makes a specific argument about procedural irregularities regarding the respondent's uncle's affidavit because it was translated by the respondent's mother who is not a certified translator. While he also complains about the risk of influence from the mother's interest, there is no legal requirement that affidavits be interpreted by a certified translator. Most significantly, the appellant asserts that the uncle's evidence was a critical part of the respondent's case, which is simply incorrect. The judge makes it clear in the Reasons that she put much less weight on his evidence (along with that of others).
- [64] Accordingly, I would not accede to this ground of appeal.

New Evidence Application

- [65] The appellant applies to adduce new evidence which includes a number of documents attached to an affidavit:
- a) the October Letter, which is addressed to the District Court and related documents;

- b) a pleading or "Jurisdictional Plea" from the respondent's counsel to the Regional Court in response to the appellant's original claim dated March 13, 2024;
- c) a pleading from the respondent's counsel responding to the appellant's appeal of the Regional Court decision dated July 5, 2024;
- d) the appeal decision of the District Court dated September 20, 2024; and
- e) the respondent's application to the District Court asking that the appeal be dismissed based on the Reasons.

[66] The respondent opposes the admission of the first three documents but consents to the admission of last two, which I would therefore admit.

[67] Turning to the opposed documents, admission of new and fresh evidence is determined with reference to the criteria set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8, summarized as follows:

- 1) The evidence could not, by the exercise of due diligence, have been obtained for the trial ...;
- 2) The evidence is relevant in that it bears upon a decisive or potentially decisive issue;
- 3) The evidence is credible in the sense that it is reasonably capable of belief; and
- 4) The evidence is such that, if believed, it could have affected the result at trial.

[68] Recently in *Barendregt v. Grebliunas*, 2022 SCC 22, the Court affirmed that the Palmer test applies to the admission of any additional evidence in all appeals, including family cases. Indicating the admission of additional evidence on appeal will be rare, the Court explained that in applying the Palmer test the overarching concern is for the interests of justice, driven by balancing finality and order in the justice system and reaching a just result in the context of the proceedings: at para. 32.

[69] The appellant argues that the opposed documents demonstrate the respondent lied under oath in her affidavit evidence and in her pleadings intentionally misled or attempted to mislead the Bulgarian courts, and are therefore relevant to the assessment of her credibility, which again he views as the critical issue in this case. The appellant also asserts that none of the documents were available to him before the "evidence deadline" in the petition proceeding.

[70] The first set of documents include most significantly the October Letter, which the appellant says has now been properly authenticated. He reiterates that the October Letter shows the respondent lied under oath when she said in her affidavit evidence that she was only a volunteer.

[71] With respect to the two pleadings prepared by the respondent's Bulgarian lawyer, the first starts with an argument that the Regional Court does not have jurisdiction based on the 1996 Hague Convention. The appellant complains the pleading includes the false assertion that

the British Columbia Provincial Court had decided on Neva's habitual residence, which is incorrect. The pleading also asserts the appellant brought the Bulgarian action in an attempt to address the consequences of the Provincial Court decision, which prohibits him from removing Neva from her habitual residence. Further, the pleading identifies or attaches a transcript and translation of the Provincial Court's non-removal order.

- [72] In the other pleading addressed to the District Court, the respondent's lawyer asks for the dismissal of the appellant's appeal, submitting that various of his arguments of fact and law are wrong. The appellant emphasizes that the pleading falsely alleges he attempted to abduct his daughter from Canada but this is preceded by the lawyer identifying and addressing the appellant's argument the child was "unlawfully removed and detained in Canada", as not supported by the facts, which "even support the contrary".
- [73] The appellant argues the respondent is responsible for any misleading content in the pleadings. I disagree. In my view, both pleadings largely reflect the role of pleadings or submissions and the lawyer's role as an advocate.
- [74] On the assumption the October Letter is properly included in the new evidence application, meaning the August Letter was not admitted at the petition hearing, I agree with the respondent that none of the opposed documents satisfy the Palmer test, apart from the credibility criteria.
- [75] Inclined to conclude the appellant has not demonstrated he made all reasonable efforts to obtain the document for the petition hearing, I view the second and fourth Palmer criteria as more significant than the timing of the new evidence.
- [76] Before discussing them, I turn to the respondent's related concern about the October Letter not being admissible to contradict the respondent's description of herself as a volunteer based on the collateral fact rule. Concerned with the need to avoid prolonging and "sidetracking" the litigation, the collateral fact rule provides that answers given during cross-examination about collateral facts are final. Generally, this includes questions and extrinsic evidence directed solely at impeaching a witness' credibility: *Dahl v. South Coast British Columbia Transportation Authority*, 2018 BCCA 184 at para. 14.
- [77] Whether or not the October Letter is inadmissible as collateral, absent cross-examination, regarding the second and fourth criteria, given the documents are tendered only to impeach the respondent's credibility, even if they are logically relevant to that issue, none of them bear on a decisive or potentially decisive issue. Again, I have determined the judge did not err in her assessment of the evidence, which included resolving material conflicts by considering contemporaneous written communications and other documents, rather than engaging in a broad assessment of the general truthfulness of each party. The credibility of the respondent, as the appellant conceives of it -- her disputed evidence was unsafe to rely on, because she was untruthful or misleading in (very) particular circumstances -- was not the critical issue the appellant says it was and should be. Assuming some or all of the new evidence was presented to the judge and believed or accepted as misleading, I do not accept

that taken with the other evidence it might have affected the result. Considered individually or together the new evidence does not have nearly the probative force required for such a conclusion. In other words, I am confident that not admitting the new evidence would have no impact on reaching a just result.

[78] As a result, I would dismiss the appellant's new evidence application.

The Bulgarian Court Decisions

[79] The appellant asserts the judge placed undue reliance or inappropriate weight on the Regional Court decision declining jurisdiction in determining Neva's habitual residence. His *factum* focuses however on assertions about the correctness of the subsequent appeal decision of the District Court, which determined Neva was habitually resident in Bulgaria. During oral submissions, the appellant argued the judge dismissed his petition mostly due to her reliance on the Regional Court decision, based on what he described as her emphasis during the petition hearing on the importance of judicial comity and the implications of a conflicting decision regarding jurisdiction.

[80] Certainly the transcript shows the judge raised the issue and asked the parties to address the Regional Court decision. But as the respondent points out the "back and forth" continued. Ultimately, the judge was provided with relevant authorities including *Pitts* and *Balev ONCA*. Although *Pitts* discussed judicial comity as a guiding factor in declining jurisdiction, the Court concluded that "beyond the overarching principle of comity", the requested state, in this case Canada, has primary responsibility for adjudicating 1980 Hague Convention applications, which *Balev ONCA* affirmed. Accordingly, the appellant having brought a return application, it was for the judge to decide on Neva's habitual residence under the 1980 Hague Convention.

[81] Nothing in the judge's reasons would suggest that the decision of the Regional Court factored into her analysis of Neva's habitual residence.

[82] *Pitts* and *Balev ONCA* are also dispositive of the appellant's further contention that the appeal decision of the District Court is owed deference based on judicial comity. Both of the Bulgarian decisions applied the 1996 Hague Convention, which, as I have said, recognizes the primacy of the 1980 Hague Convention. This further underscores that the appeal decision like the initial decision would not have been owed deference in determining Neva's habitual residence pursuant to the 1980 Hague Convention. Further, as the respondent points out, the analysis of habitual residence in the District Court decision does not accord with the hybrid approach. Instead of determining the focal point of Neva's life, the District Court treated the respondent's habitual residence as determinative, given Neva's young age. Had the judge considered herself bound by the appeal decision, she would not only have abdicated Canada's responsibility as the requested state to adjudicate the appellant's return application, but also would have deferred to an approach to habitual residence that is contrary to the hybrid approach that she was required to apply.

[83] I would dismiss this ground of appeal.

Disposition

[84] I would dismiss the appeal.

[85] DICKSON J.A.: I agree.

[86] IYER J.A.: I agree.

[87] DICKSON J.A.: The appeal is dismissed.

"The Honourable Justice Fleming"

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