

CITATION: Issasi v. Rosenzweig, 2011 ONCA 302

DATE: 20110418

DOCKET: C52822

COURT OF APPEAL FOR ONTARIO

Cronk, Gillese and MacFarland JJ.A.

BETWEEN

Amparo Marlen Rodriguez Issasi

Applicant (Respondent on Appeal)

and

Kenneth Espinal Rosenzweig

Respondent (Appellant on Appeal)

Jeffery Wilson and Chelsea Hooper, for the respondent (appellant on appeal)

Philip M. Epstein Q.C., Aaron M. Franks, Daniella Wald and Michael Zalev, for the
applicant (respondent on appeal)

Lucy McSweeney, Katherine Kavassalis and Caterina E. Tempesta, for the Office of the
Children's Lawyer

Urszula Kaczmarczyk and Jocelyn Espejo Clarke, for the Attorney General of Canada

Sean Hanley, for the Attorney General of Ontario

Angus Grant, for the intervener, Canadian Council for Refugees

Lorne Waldman, for the intervener, the United Nations High Commissioner for Refugees

Jacqueline Swaisland, for the intervener, the Canadian Civil Liberties Association

Heard: April 12 and 13, 2011

On appeal from the order of Justice George Czutrin of the Superior Court of Justice, dated September 21, 2010.

BY THE COURT:

[1] By order dated September 21, 2010 (the Order), Josette Rosenzweig Issasi was found to be wrongfully retained in Ontario and ordered to be returned to Mexico, pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction* (*Hague Convention*). The *Hague Convention* application was brought by Josette's mother.

[2] At the time the Order was made, Josette was 13 years old. She had been living in Toronto, Ontario for approximately 21 months, during which she had made a claim for refugee protection by reason of abuse by her mother. She was found to be a Convention Refugee by the Immigration and Refugee Board of Canada, Refugee Protection Division, on April 27, 2010.

[3] Josette was taken back to Mexico on October 15, 2010.

[4] Her father appeals the Order. Because of the international and human rights aspects of this appeal, many others have participated, as parties or interveners.

[5] The human dimensions of this appeal make its resolution urgent. The legal complexities demand otherwise. In the result, we have decided to release our decision,

with only the briefest of reasons, at this time. Full reasons for judgment that address the many difficult legal issues that have been raised will follow.

THE QUESTION

[6] The ultimate question that must be resolved on appeal can be simply stated: did the motion judge err in ordering that Josette be returned to Mexico?

THE ANSWER

[7] Yes.

[8] The short reason for arriving at this answer is as follows. In our view, there is no conflict between s. 46 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (*Hague Convention*) and s. 115 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Properly interpreted, harmonious effect can be given to both.

[9] In applying the *Hague Convention*, the family court must conduct an appropriate risk assessment regarding the return of a child who has been found to be a refugee. As we will explain in the reasons that will be subsequently provided, no meaningful risk assessment was or could have been undertaken in the circumstances of this case at the time the motion was heard. As a result, the Order cannot stand; this court stands in the shoes of the motion judge.

[10] While the record before this court is much more extensive than that which was before the motion judge, in our view, the risk assessment cannot be done without *viva voce* evidence. Consequently, a new hearing must be conducted.

RELIEF

[11] Accordingly, we would allow the appeal, set aside the Order, and direct that a new *Hague Convention* hearing be undertaken. The parties have attorned to this court's jurisdiction. We therefore direct the parties to do everything within their power to co-operate and facilitate Josette's return to Ontario to participate in the new hearing.

[12] We recognize that this leaves open the question of the care and supervision of Josette if she is returned to Ontario before the new *Hague Convention* hearing can be convened. We also recognize that there are uncertainties at present regarding those steps necessary to effect Josette's return to Ontario. If necessary, the issue of Josette's care and supervision pending the determination of the new *Hague Convention* hearing shall be left to the discretion of the Office of the Children's Lawyer, in consultation with the appellant, the respondent, and those of the other parties as may be advisable.

[13] For the sake of clarity and to ensure that there is no misunderstanding, we advise that additional relief and directions regarding the new hearing may be ordered when our full reasons for decision are released.

RELEASED:

“APR 18 2011”

“E.A. Cronk J.A.”

“EAC”

“E.E. Gillese J.A.”

“J. MacFarland J.A.”