

COURT OF APPEAL FOR ONTARIO

CITATION: Zafar v. Saiyid, 2018 ONCA 352

DATE: 20180411

DOCKET: C64581

Strathy C.J.O., Roberts and Paciocco JJ.A.

BETWEEN

Mahmud Zafar

Applicant
(Respondent in Appeal)

and

Qurratul Ain Saiyid

Respondent
(Appellant in Appeal)

Anser Farooq, for the appellant

Robert McQueen, for the respondent

Heard: March 28, 2018

On appeal from the orders of Justice G.D. Lemon of the Superior Court of Justice, dated September 13, 2017 and November 7, 2017, with reasons reported at 2017 ONSC 5119 and 2017 ONSC 6688.

REASONS FOR DECISION

[1] The present appeal is from the orders of the application judge requiring the appellant mother to return the parties' children to their habitual residence in England for custody and access to be determined there. The orders were made pursuant to Article 12 of the *Convention on the Civil Aspects of International Child Abduction* ("Hague Convention"), as incorporated in s. 46(2) of the

Children's Law Reform Act, R.S.O. 1990, c. C.12. Under Article 12 of the Hague Convention, where the court determines that a child has been wrongfully removed or retained, the court shall order the return of the child forthwith.

[2] The appellant also seeks to file fresh evidence about the current status of the children and of proceedings she has started in England. In our view, the fresh evidence meets all of the criteria for admission on this appeal: *Children's Aid Society of Toronto v. P.M.*, 2015 ONCA 695 at para. 23.

[3] The appellant and the respondent are married with two small children who were born in England but are also Canadian citizens. Up until the appellant brought them to Canada to visit her parents, initially with the respondent's consent, the children resided in London, England.

[4] On August 23, 2016, the appellant advised the respondent that their marriage was over and that she and the children would not be returning to England. The respondent brought an application under the Hague Convention for the return of the children to England.

[5] During the Hague application hearing, the appellant conceded that the children were habitually resident in London, England. She argued against the return of the children primarily on the basis of Article 13(b) of the Hague Convention, arguing that the respondent poses a grave risk of physical and psychological harm to the children. The respondent denied these allegations.

[6] The application judge declined to conduct a risk analysis in relation to the appellant's allegations under Article 13(b) of the Hague Convention because of the parties' conflicting affidavit evidence. He stated:

In a Hague application, I am not to determine best interests of the children; only jurisdiction. In any event, on affidavits alone, I cannot determine who is telling the truth about Mr. Zafar's conduct. That is a matter for the English courts.

[7] As a result, the application judge ordered that the appellant return the children to London, England by December 1, 2017, failing which, the respondent would have sole custody of the children and could return to England with the children.

[8] On November 27, 2017, the appellant obtained an order from this court staying, until the disposition of the appeal, the provisions of the application judge's order requiring her return to England and giving sole custody to the respondent if the children do not return.

[9] On December 17, 2017, the appellant returned voluntarily to London, England with her children.

[10] According to the fresh evidence filed on this appeal, the appellant has commenced family law proceedings in England, asking, among other things, that she be permitted to return to Canada with the children. The hearing of that issue has been scheduled for May 10, 2018 on an urgent basis.

[11] The main thrust of the present appeal is that the application judge made the following errors: he erred in awarding custody to the respondent as a consequence of the mother's breach of his order; he erred in ordering the appellant to return to England with the children; and he erred in declining to assess whether the grave risk of harm override provision in Article 13(b) was engaged.

[12] If successful on this appeal, the appellant no longer seeks a new hearing of the respondent's application but is content that the English courts decide the issues between the parties. However, the appellant is concerned that the errors in the application judge's orders may prejudice her position in the English proceedings. To that end, she submits that her appeal is not moot.

[13] We agree.

[14] To award custody of the children to one parent as a consequence of the other parent's failure to obey a court order is an error as it fails to consider or prioritize the children's best interests.

[15] Similarly, to the extent that he did so, the application judge was without jurisdiction to order the appellant to return to England with her children.

[16] We also agree that the application judge erred in stating that he could not determine whether the children were at grave risk of serious harm and then delegating this matter to the English courts. Article 13(b) of the Hague

Convention, requires the court to consider the possibility of grave risk of physical or psychological harm to the children arising from an order returning them to their country of habitual residence.

[17] The appellant argued before the application judge that “the threatening, abusive and intolerable behaviour towards the [mother] by the [father], and drinking and smoking habits of the [father] reflects inability to create a safe environment free of danger for the children”. She further submitted that if the children are ordered to return to England she would have to return with them and she would be returning to a dangerous situation. The appellant alleges that the respondent is physically abusive, verbally abusive, and financially controlling. The respondent denied these allegations.

[18] A grave risk of harm to a child’s mother can establish a risk to the child as well: *Cannock v. Fleguel*, 2008 ONCA 758 at para. 41.

[19] In our view, it was an error for the application judge to explicitly decline to decide whether he believed allegations that, if believed, could engage the protective function of the court to decline to order the children’s return.

[20] Having found that the issue of risk could not be determined on the existing record of conflicting affidavit evidence, it was incumbent on the application judge to consider whether oral evidence was required to allow him to complete his risk analysis or whether he could make a decision based on the sufficiency of the

record and the appellant's evidentiary onus. He erred in doing neither and instead delegating the risk assessment to the English courts.

[21] For these reasons, we conclude that the orders of the application judge must be set aside. As the issues between the parties, including the question of whether the appellant may return to Canada with her children, are now before the English courts, we do not order a new hearing of the respondent's application in Ontario.

[22] In the unusual circumstances of this case, we set aside the application judge's order of costs and order that there be no costs of the application or the appeal.

"G.R. Strathy C.J.O."

"L.B. Roberts J.A."

"David M. Paciocco J.A."