CITATION: Kosenkov v. Kosenkova, 2024 ONSC 3807
COURT FILE NO.: FS-24-24314
DATE: 20240703

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Oleksii Serhiiovych Kosenkov	)	
Applicant	)	Aileen Manalang, for the Applicant
– and –	)	
Marharyta Oleksanrivna Kosenkova	)	
Respondent	)	Mary Anne Ducharme, for the Respondent
	)	
	)	**HEARD:** June 13, 2024

REASONS FOR DECISION

J.R. MACFARLANE J.:

Introduction

[1] This matter was heard by videoconference. It is an application for the return of the child, Mariia Oleksiivna Kosenkova, born July 2, 2018 ("Mariia") to Ukraine, pursuant to the *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 ("*Hague Convention*"). Canada and Ukraine are both signatories to the *Hague Convention*, which is in force in Ontario by virtue of s. 46(2) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12.

[2] The applicant father ("Oleksii") and respondent mother ("Marharyta") were married in 2015 and separated in the summer of 2020. They were divorced in Ukraine on August 19, 2021. Their only child, Mariia, was removed from her habitual residence in Ukraine by the respondent mother to Poland in June 2022 without the applicant father's consent. They then travelled to Germany, and ultimately to Canada on June 16, 2023, all without the consent of the father. These facts are not in dispute.

[3] The parties are in agreement that the general analytical framework for applications under the *Hague Convention* is set out in *Ludwig v. Ludwig*, 2019 ONCA 680, 437 D.L.R. (4th) 517 ("*Ludwig*"): (1) determine habitual residence of the child using a "hybrid model"; (2)

if there is controversy, and if the child is habitually resident in the state of the applicant, determine if one of the exceptions applies to the general provision favouring (and in most cases, mandating) the return of the child to the state of habitual residence.

[4] In the present case, there is no argument that Ukraine was the state of Mariia's habitual residence at the time of her removal. The issues before the court in this case are as follows:

1) Was the removal of Mariia from Ukraine by Marharyta wrongful within the meaning of Article 3 of the *Hague Convention*?

2) If the removal was wrongful, were the proceedings commenced within one year from the date of the wrongful removal?

3) If the proceedings were commenced more than one year from the date of the wrongful removal, is Mariia now settled in Canada?

4) If the removal was wrongful, has the respondent mother established that there is a grave risk that Mariia's return to Ukraine would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation?

Issue No. 1 – Mariia's Removal from Ukraine

a) The Evidence

[5] It is common ground that Oleksii did not consent to Marharyta removing Mariia from Ukraine in June 2022.

[6] The family had resided in the City of Kharkiv in eastern Ukraine, about 30km from the Ukrainian-Russian border. Kharkiv is the second-largest city in Ukraine, behind the capital city, Kiev. Although Oleksii had initially sought relief from this court that Mariia be declared to have been habitually resident "at City of Kharkiv, Country of Ukraine", and that she be returned to Kharkiv, it is clear that this court does not have jurisdiction to make that kind of order. The *Hague Convention* is a treaty between Canada and Ukraine, not Windsor or Ontario and Kharkiv, and the only relief available under the *Hague Convention* would be the return of Mariia to Ukraine. The specific location within Ukraine can be considered in the context of protective measures that could be imposed in the context of an order for return of Mariia.

[7] Oleksii and Marharyta separated in the summer of 2020. Before that, they had lived as a family together in a two-bedroom apartment in Kharkiv owned by Oleksii. When they separated, Okesii moved out for about a year. He moved back into the apartment in the summer of 2021, but he stayed in a separate bedroom from Marharyta and Mariia. Although a divorce order was made in August 2021, there is no agreement in writing or court order with respect to custody (*i.e.*, "decision-making responsibility" in the terminology used in Ontario today) or access (*i.e.*, "parenting time"), or any other aspect of the parenting of Mariia. It is clear from both parties' evidence that Oleksii continued to

be involved in Mariia's life, although the parties dispute the degree of that involvement somewhat.

[8] Since Russia launched a full-scale invasion of Ukraine in February 2022, Kharkiv has been a major focus of the Russian attack. The respondent stated in her affidavit, sworn May 6, 2024, that following the invasion and initial assault on Kharkiv, "[t]he bombing of Kharhiv never stopped. The city still gets bombed every day." Although he contends Kharkiv is "safe", the respondent acknowledged in his affidavit, sworn May 9, 2024, that Kharkiv "is badly affected by the war." The two countries are still at war with each other, and I note that on the day this application was heard, the President of Ukraine was meeting with G7 leaders in Italy to confirm their ongoing support for Ukraine in its war effort against Russia.

[9] Oleksii's notice of application lists one of the "important facts supporting" the application as "[a]lthough there is war in Ukraine, the city where the Applicant's home is situated is not affected by the war." This is clearly not the case. Oleksii later deposed that "The City of Kharkiv is badly affected by the war".

[10] Shortly after the February 2022 Russian invasion of Ukraine began, Oleksii and Marharyta fled Kharkiv to Krasnograd, a small town approximately 100km southwest of Kharkiv. They stayed there together in a small apartment along with Marharyta's mother and brother for a period of time. Marharyta's evidence is that she did not feel safe in Krasnograd, had no intention of returning to Kharkiv, and was looking for alternatives for her and Mariia.

[11] Ultimately, Marharyta took Mariia to Poland on June 23, 2022. She has offered no explanation for doing so without Oleksii's consent, other than wanting to be safe from the war. The respondent provided the court with a 2022 communication from the Embassy of Ukraine to Canada to the effect that children under 16 were permitted to leave Ukraine with one parent, without the written consent of the other parent. There was no evidence from Marharyta that she relied on this communication in making her decision to leave the country without Oleksii's consent.

[12] Marharyta and Mariia left Poland after a short time and traveled to Germany, where they remained until June 16, 2023, when they travelled to Canada through Portugal. Throughout this time, they remained in contact with Oleksii through video calls. During their time in Germany, particularly in May 2023, they spent time with Oleksii's sister, Daria Russu, who was 19 at the time and living there.

[13] Marharyta and Mariia were in Germany for nearly a year. In February 2023, Oleksii attempted to file an application for the return of Mariia with the Ministry of Justice of Ukraine. That application, a copy of which is purportedly attached as Exhibit "A" to Oleksii's affidavit sworn February 29, 2024 ("First Affidavit Oleksii") was returned to him as incomplete. That document is obviously incomplete on its face, and the response from the Ministry of Justice of Ukraine is not in evidence. Moreover, Oleksii stated in the First Affidavit Oleksii that he also filed a "court application" at that time, but no such court application is in evidence.

[14] Exhibits “B” and “C” to the First Affidavit Oleksii are stated to be respectively his application to the Ministry of Justice of Ukraine for the return of Mariia from Canada, and the September 2023 response from the Ministry of Justice in Ukraine. Both of these documents are clearly misidentified. The document marked as Exhibit “B” is a single page that appears to be the last page of the February 2023 application. The document marked as Exhibit “C” appears to be the application for the return of Mariia dated August 21, 2023. The 15 documents stated to have been attached to the application are not included. The document identified in para. 13 of the First Affidavit Oleksii, being the September 2023 response from the Ministry of Justice of Ukraine, is not in evidence, however it appears from Exhibit “D” that the “file was approved and opened on September 6, 2023 by [Ontario] Ministry of the Attorney General Counsel, Shane Foulds”. The present court application was issued on March 6, 2024.

[15] Mariia has lived in Canada, specifically in Windsor, Ontario, since June 2023. When she left Ukraine, she was three years old, and she is now almost six. The evidence from Marharyta and Shannon Carter, Mariia’s senior kindergarten teacher at General Brock Public School in Windsor, is that Mariia is doing well.

[16] In the First Affidavit Oleksii, there was no mention of the flight to Krasnograd at the start of the war. Oleksii returned to his apartment in Kharkiv in or around July 2022, and I understand from his affidavits that he has remained there since that time. Oleksii is currently unemployed, but he deposed he is exempt from conscription into the Ukrainian military because he cares for his elderly stepfather who lives next door to him.

[17] At the return of this matter on May 17, 2024, I made the following orders:

1. The applicant shall obtain from the Ukrainian authorities a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the *Hague Convention*, pursuant to Article 15 of the *Hague Convention*. This court requests that the Central Authorities of Canada and Ukraine assist the applicant so far as practicable to obtain such a decision or determination, as provided in Article 15 of the *Hague Convention*.

2. The parties shall file affidavits from Ukrainian/English certified translators to accompany each of the affidavits sworn by witnesses whose first language is Ukrainian (other than Anna Rashevska, who has deposed to being an English teacher), attesting to having translated the affidavit and all documents referenced therein from English to Ukrainian to the witness before it was sworn, and that the translator was satisfied that the witness understood the contents of the affidavit.

3. The applicant shall file evidence containing full particulars of the protective measures that the applicant proposes that could be ordered by the court and/or undertaken to be performed by the applicant pending the Ukrainian court addressing the matter if Mariia is ordered returned to Ukraine, as well as evidence as to the availability and ability of the Ukrainian courts to address the matter of custody and relocation.

4. The respondent shall file evidence containing the full particulars of her and Mariia's current immigration status in Canada, including but not limited to copies of Canadian government documentation confirming such status.

[18] As a result of those orders, the parties filed affidavits of translation to the satisfaction of the court. Oleksii filed further evidence which I summarize briefly as follows:

a) An affidavit of Vasylenko Tamila Volodymyrivna, a lawyer in Kharkiv, Ukraine, sworn May 28, 2024, indicating that the courts in the City of Kharkiv are open; that the *Family Code of Ukraine* provides that when a divorce order is silent as to the residence of a child under ten years of age, residence is determined mutually by both parents; and that in the absence of mutual agreement as to residence, it shall be determined by the court.

b) An affidavit of Daria Russu, Oleksii's sister, sworn May 30, 2024, attaching photos of Mariia and indicating that she is willing to travel to Canada to accompany Mariia if the court orders her return to Ukraine.

c) An affidavit of Oksana Hryhorivna Konopatska, a psychologist and pre-school educator in Kiev, sworn June 1, 2024, indicating that Oleksii had asked her to provide counselling/services to Mariia, "to help her overcome any trauma or emotional and adjustment issues that may have resulted from being uprooted from Ukraine", that she is willing to provide such services, and that almost all of the schools in Ukraine are operational.

d) A further affidavit of Vasylenko Tamila Volodymyrivna sworn June 4, 2024, attesting to a return to normal operations of the courts throughout Ukraine, since "Russia attempted its occupation of Ukraine".

e) An affidavit of Lyudmila Oleksandrivna Nikolayeva sworn June 4, 2024, a high school teacher in Kiev deposing to the suspension of in-person classes "when Russia attempted its occupation" and then return to in-person classes for most schools in Ukraine by September 2022, and the ability of one parent to register a child in school without the other parent's consent.

f) A further affidavit of Oleksii sworn June 5, 2024, providing undertakings with respect to how Mariia would be transported to Ukraine via Germany, temporary accommodation in Kiev at the home of his aunt, Anna Rashevska, referral to Oksana Hryhorivna Konopatska for counselling and tutorial services, school registration, and various other activities. He also provided evidence regarding his intended work hours (9:00 a.m. to 6:00 p.m.) and his intention to transport Mariia to and from school.

g) An affidavit of Sajana Kunjumon, a legal assistant in Ms. Manalang's firm, sworn June 7, 2024, attaching an email message received that day enclosing correspondence from Kateryna Shevchenko, an official in the Ministry of Justice of Ukraine, which provides information as to the status of infrastructure in Kiev; referencing articles 150 and 160

of the *Family Code of Ukraine* as obligating parents to "determine a safe place of residence for their children as well as take protective measures for them"; and confirms that the Ukrainian regulation permitting one parent to cross a border with a child without the consent of the other parent is a border crossing policy that does not inform family law rights.

h) An affidavit of Viktoria Rudna, Mariia's former kindergarten teacher in Kharkiv, sworn June 12, 2024, confirming that Mariia's former public school continues to be closed, but some private schools are open.

[19] Also in response to the May 17, 2024 orders, Marharyta filed further affidavits which I summary briefly as follows:

a) An affidavit of Jana Sergeevna Koltunova, a friend of Marharyta's living in Kiev, sworn June 5, 2024, confirming the ongoing difficulties in Kiev, with daily power outages and frequent internet outages. She attached photos of the apartment building next to hers that was hit by Russian missiles in March 2024 and another building close by that was bombed in January 2024. She also described receiving multiple bomb alerts in recent days. She noted schools in Kiev have staggered schedules (some grades in the morning and others in the afternoon) because the school bomb shelters are not large enough to hold all of the students.

b) An affidavit of Shannon Carter, Mariia's teacher in Windsor, sworn June 10, 2024, attesting to her doing well in school.

c) A further affidavit of Marharyta sworn June 8, 2024, confirming that she and Mariia are in Canada respectively on a work permit and a study permit, both issued June 16, 2023, and valid until December 14, 2025; advising that she is in receipt of Ontario Works benefits and has participated in various training and employment search programs; confirming that Ukraine continues to be under martial law; and attesting that Mariia continues to do well in school.

[20] I will now briefly summarize the relevant law on this issue and provide my analysis of the evidence.

b) Law and Analysis

[21] This first issue is relatively straightforward. The pertinent articles of the *Hague Convention* provide as follows:

Article 1

The objects of the present Convention are –
a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State;
and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

…

Article 3

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.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

…

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it

> may stay the proceedings or dismiss the application for the return of the child.
>
> 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 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.

[22] A removal of a child is wrongful within the meaning of Article 3 of the *Hague Convention* where the child is removed from his or her habitual residence in breach of a person's custody rights where that person was actually exercising those rights at the time of the removal. The removal of a child by a parent with shared or joint custody is wrongful because it breaches the custody rights of the left-behind parent.

[23] At para. 136 of her affidavit sworn May 6, 2024, Marharyta deposed that "[w]ithout the war I would have sought the consent of the Applicant because he was the father and it would have been appropriate and required by law. But there was chaos everywhere. Because of the war the government of the Ukraine waived the Applicant's consent." I specifically reject this evidence. The Government of Ukraine issued a communication with respect to border crossing but did not displace parental rights in doing so. Marharyta knew that Oleksii had custodial rights and ignored them in unilaterally deciding to flee the country with Mariia.

[24] I am satisfied on the basis of the evidence filed by Oleksii that his custodial rights (or in the terms used in Ontario, his decision-making rights) were not defined by court order or by agreement following his separation and divorce from Marharyta. I find that the decision to flee from Kharkiv to Krasnograd was a relocation decision made jointly by both Oleksii and Marharyta, and that such a decision was properly a mutual decision under the removal

of Mariia from Ukraine in accordance with the *Family Code of Ukraine*. This is a clear example of Oleksii actually exercising his custodial rights in the months immediately before Mariia was removed from Ukraine. I am satisfied that on the whole of the evidence, Oleksii and Marharyta had shared custody rights with respect to Mariia. I see no evidence that Oleksii was not actually exercising his custodial rights at the time that Marharyta unilaterally removed Mariia from Ukraine in June 2022, without Oleksii's consent. There is no evidence to suggest that Mariia was habitually resident anywhere other than Ukraine. I am satisfied that Marharyta's removal of Mariia from her habitual residence in Ukraine was a breach of Oleksii's custody rights, and that he was actually exercising those rights at the time of the removal: the removal of Mariia from Ukraine on or about June 23, 2022, was wrongful within the meaning of Article 3 of the *Hague Convention*.

Issue No. 2 – The Date of Commencement of the Proceedings in Relation to the Wrongful Removal

a) The Evidence

[25] The evidence on this issue is summarized above, but may be further distilled as follows:

a) On June 23, 2022, Mariia was wrongfully removed from Ukraine, travelling first to Poland, and then to Germany.

b) In February 2023, Oleksii attempted to file an application with the Ukrainian Central Authority for the return of Mariia from Germany, but the application was rejected as incomplete.

c) On June 16, 2023, nearly a year following the removal of Mariia from Ukraine, she travelled with Marharyta to Canada.

d) On August 21, 2023, Oleksii filed an application with the Central Authority in Ukraine for the return of Mariia from Canada. The application was accepted by the Ontario Ministry of the Attorney General (*i.e.*, the Central Authority for Ontario) on September 6, 2023.

e) The application to this court was issued on March 6, 2024.

b) Law and analysis

[26] The relevant wording of Article 12 of the *Hague Convention* is "at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention".

[27] Oleksii's attempt to file an application in February 2023 for the return of Mariia from Germany did not mark the "commencement of the proceedings" for the purpose of Article 12. The evidence put forward of the filing of that incomplete application and its rejection

was very unclear, and the explanation for failing to rectify the deficiencies in that application while Mariia was still in Germany is inadequate. The court is unable to determine whether there was any continuity or crossover between the two applications such that the commencement of the proceedings might properly be considered to have been the attempted filing in February 2023.

[28] In my view, the relevant date for the "commencement of the proceedings" for the Article 12 analysis is August 21, 2023, at the earliest, which is when Oleksii filed the application that has definitively led to the present court proceeding. This was some 14 months after Mariia's wrongful removal from Ukraine.

[29] Accordingly, a period of more than one year had elapsed from the date of the wrongful removal, and for that reason it is necessary to consider the next issue, which is whether it has been demonstrated that Mariia is "now settled" in her new environment.

Issue No. 3 – Is Mariia now Settled in her New Environment?

a) The Evidence

[30] Mariia was three years old and habitually resident in Ukraine when, in early 2022, she was taken from Kharkiv to Krasnograd with both of her parents to flee the Russian invasion and the proximate reality of the war. She was wrongfully removed from Ukraine and spent nearly a year in Germany, before travelling to Canada just over a year ago. At the time the application was heard, Mariia was about to turn six years old and was completing her first year of school in Canada. Mariia has lived exclusively with her mother for the past two years, and I accept that she has been in the primary care of Marharyta for her entire life. Although Oleksii had significant parenting time with Mariia, it is clear that he was working full-time until the war and Mariia was a stay-at-home mother. This preponderance of parenting time continued after the couple's separation and divorce. Oleksii has continued to have regular parenting time with Mariia via videoconference.

[31] Both Mariia and Marharyta are in Canada on temporary permits, although Marharyta has indicated an intention to apply for extensions. Although there was mention of Canadian refugee programs relating to people affected by the war in Ukraine, there was no evidence that either Marharyta or Mariia are refugees in Canada. They are both Ukrainian citizens, and Mariia's father continues to reside in Ukraine. Marharyta has deposed that she intends to remain permanently in Canada.

[32] On the evidence of Marharyta and Mariia's teacher, Mariia is doing well in Windsor, learning English and making friends at school. Mariia attends church with her mother, and they participate in a group that assists newcomers to Canada. Mariia is registered in swimming and figure skating lessons, which she appears to enjoy. There was some evidence from Oleksii regarding his observing during video calls that Mariia had some poor dental hygiene, but I do not place any weight on this evidence.

[33] Ms. Carter, Mariia's teacher, has deposed that "I feel that a move from her home and school at this time would be detrimental to Mariia both socially and academically."

b) Law and Analysis

[34] Article 12 of the *Hague Convention* provides for what is sometimes referred to as the "now settled" exception to the general requirement that a wrongfully-removed child be returned to their country of habitual residence. It reads, "[t]he judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

[35] On this issue, I have considered the following caselaw: *Ludwig*; *Kubera v. Kubera*, 2010 BCCA 118, 3 B.C.L.R. (5th) 121 ("*Kubera*"); *Nowlan v. Nowlan*, 2019 ONSC 4754 ("*Nowlan*"); and *Wallace v. Williamson*, 2020 ONSC 1376 ("*Wallace*"). The principles that emerge from those cases are that the court should undertake a "child-centric" factual inquiry to determine the child's actual circumstances at the date of the hearing; it is to those circumstances that the policies and objectives of the *Hague Convention*, which favour prompt return, must be applied: *Ludwig*, at para. 37; *Kubera*, at para. 48. It is not simply an analysis of the "best interests" of the child.

[36] In *Kubera*, Levine J.A. described the rationale for the "now settled" exception at paras. 38-39:

> [38] This exception is a recognition that the interests of a child in not having his or her life disrupted once he or she has settled down in a new environment may, in a certain case, override the otherwise compelling need to protect all children from abduction. After one year, the immediate return envisaged by the [*Hague*] *Convention* is no longer possible. Those policies that are presumed to justify mandatory repatriation in all cases prior to the expiry of the one year period will, with the passage of time, tend to weaken. Those that require consideration of the welfare and interests of the particular child tend to strengthen. The result is that the further one gets from the objective of swift repatriation, the greater the likelihood that ordering the child's return will only "accentuate the harm caused by the wrongful relocation".
>
> [39] A court tasked with applying the exception must determine, therefore, whether in the actual circumstances of the particular case, the balance between these considerations no longer supports what is otherwise a mandatory obligation to return the child.
>
> [Citations omitted.]

[37] *Nowlan* involved a four-year-old child at the time of the hearing who had been wrongfully retained two years before the hearing. The child's father had removed her from Virginia, United States, to Ontario, initially with the mother's consent, where there had been conflict in the child's home and the mother suffered from mental health challenges. The child in *Nowlan* was not yet in school or participating in extracurricular activities. M. Fraser J.

determined, at para. 51, that "[t]he greatest factor relevant in this case to the determination of whether the child has settled into her environment is the security and stability of the environment she now finds herself in with her father." In those circumstances, M. Fraser J. concluded that the young child had settled into her new environment.

[38] In *Wallace*, Shore J. considered the situation of another four-year-old child. Although Shore J. found that proceedings had been commenced within one year of the wrongful removal of the child from Arizona, United States, to Ontario, she still went on to consider the "now settled" exception. Justice Shore concluded that the child was not settled in her new environment on the facts before her, but helpfully summarized the analytical framework adopted in *Kubera* for assessing the child's circumstances in light of the objectives of the *Hague Convention*, at paras. 41-42 as follows:

> [41] The Court of Appeal in *Kubera* adopted the guidance provided by the Nova Scotia Court of Appeal in *A. (J.E.) v. M. (C.L.)*:
>
> *61 The "settled" exception is particularly difficult to apply. It requires the court to weigh directly certain aspects of the child's best interests — particularly that of not being uprooted — even though the individual child's best interests are not generally the focus of the inquiry under the Convention. The difficulty is that refusal to return based on the assessment of the child's best interests tends to undermine the fundamental objectives of the Convention. Thus, if interpreted too broadly, the settled exception would undermine the effective operation of the Convention. On other hand, if interpreted too narrowly, the exception would be robbed of any practical effect.*
>
> . . . . .
>
> *67 I would conclude, therefore, that the settled exception ought to be approached not simply by examining the child's present circumstances in the new environment, although that is an important part of the inquiry. In addition, the child's present circumstances need to be assessed in light of the underlying objectives of the Convention and in particular how ordering return of the child is likely to further those objectives.*
>
> *68 It will be helpful, therefore, to consider how the key objectives of the Convention relate to the specific circumstances of the child whose return is sought. To repeat, the relevant objectives include first, general deterrence of international child abduction by parents; second, prompt return of the child facilitated by precluding a full inquiry into the "best interests" of the child in the state to which the abductor has fled with the child; third, restoration of the status quo; and, fourth, entrusting to the courts*

> *of the place of habitual residence the ultimate determination of what the best interests of the child require.*
>
> [42] As set out in *Kubera*, there are four interrelated objectives of the Convention, directed at protecting the interests of children generally. These include:
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> a. Deterrence of international child abduction;
>
> b. Rapid return of the child;
>
> c. Restoration of the status quo; and
>
> d. Deference with respect to the determination of a child's best interests to the courts of the place of habitual residence.
>
> [Emphasis in original; citations omitted.]

[39] Considering the four objectives of the *Hague Convention* in the context of this case, I find as follows:

a) Deterrence

Marharyta wrongfully removed Mariia from Ukraine without Oleksii's consent. She relies upon communications from the Government of Ukraine as justifying her actions and entitling her to unilaterally remove Mariia from Ukraine during the war. She asserts that Oleksii's custodial rights have been suspended during the war. I reject this position. Oleksii was entitled to be involved in any decision involving Mariia's relocation, either within Ukraine or internationally.

That said, I accept that Marharyta's primary motivation for removing Mariia from Ukraine was to protect both of them from the war, which is ongoing. I am also satisfied that a secondary motivation was Marharyta's wish to pursue a new relationship with Vitaly Fokov in Canada.

On balance, I find that Marharyta's motivations were, in part, to undermine the objectives of the *Hague Convention*, but not to a substantial degree.

b) Rapid Return

As two years – a third of Mariia's life to date – have passed between the wrongful removal and the hearing of the application, a prompt return of Mariia to Ukraine is not possible.

c) Restoring the *Status Quo*

A return to the *status quo* in this case is neither possible nor desirable. Mariia's life in Kharkiv was displaced by the chaos of war, and Oleksii now proposes (contrary to his initial application) to return Mariia to Ukraine, but to a temporary residence in Kiev and subject to various protective measures. I find that restoring the *status quo* is not a compelling or practical objective in all of the circumstances.

d) Deference to the Ukrainian Courts

In the circumstances of this case, the objective of entrusting the courts of Ukraine with the ultimate determination of what is in Mariia's best interests is not a strong consideration. Mariia is almost six years old and has been residing outside Ukraine for two years. Ukraine is still at war with Russia. Although there is some evidence that courts are functioning normally in Ukraine, I am troubled by the efforts of Oleksii and the witnesses who provided affidavits on his behalf to downplay and even deny to a degree the significance of the war. Most of the evidence relating to Mariia's best interests will be found in Windsor, not in Kharkiv or Kiev. I consider this to be a neutral factor at best.

[40] I accept the evidence of Marharyta and Ms. Carter, and conclude that Maraharyta has demonstrated that Mariia is now settled into her new environment in Windsor, Ontario. The underlying objectives of the *Hague Convention* when considered in the factual matrix of this case are not sufficiently compelling to warrant returning Mariia to Ukraine given the disruption to her life that would result.

Issue No. 4 – Grave Risk of Harm/Intolerable Situation

[41] In the event that I am wrong in concluding that Mariia is now settled in Canada, I will also consider the Article 13(b) exception: whether there is a grave risk that her return to Ukraine would expose the child to physical or psychological harm or otherwise place her in an intolerable situation.

a) The Evidence

[42] The evidence filed by Oleksii includes his own affidavit and affidavits from several others. His application was initially to return Mariia to live with him in his apartment in Kharkiv, where he continues to reside. He is unemployed and exempt from military service because he cares for his elderly stepfather who lives next door. He has admitted that Kharkiv is badly affected by the war.

[43] Now, he seeks to return Mariia to Ukraine to live temporarily with him and his aunt in a two-bedroom apartment in Kiev while he secures full-time work. Kiev is not unaffected by the war and continues to be the target of Russian missile attacks. I accept the evidence of Jana Sergeevna Koltunova as to the current living conditions in Kiev, and reject the

evidence filed by Oleksii to the effect that life has returned to "normal" in Kiev. The country is still at war and Russia continues to attack Kiev, the capital city.

[44] I note that Marharyta has filed, as Exhibit "C" to her affidavit sworn May 6, 2024, a Canadian government travel advisory with respect to Ukraine that is posted on the canada.ca website, last updated April 17, 2024. I take judicial notice that although updated as recently as June 4, 2024, the essence of the advisory remains unchanged. It reads, in part:

> Avoid all travel to Ukraine due to the Russian military invasion. Your safety is at high risk, particularly if you engage in active combat.
>
> Russia launches missile and drone strikes against Ukrainian civilian and government infrastructure. These include attacks on city centres and populated areas, including [Kiev]. The ongoing Russian invasion poses a significant security risk, even if you are not near the front lines.
>
> If you are in Ukraine, you should consider leaving the country if you can do so safely.
>
> Our ability to provide consular services in Ukraine is severely limited.

[45] I note that this advisory specifically references the ongoing attacks in Kiev, and the severe limitations on Canadian consular services there. This directly contradicts the evidence filed by Oleksii, specifically the evidence of Anna Rashevska, Oleksii's aunt in Kiev who deposed in her affidavit sworn May 9, 2024, that there are approximately 83 diplomatic missions and embassies in Kiev, and "[m]any of these diplomatic missions, including Canada and the United States of America, are open and fully operational."

b) Law and Analysis

[46] Article 13(b) of the *Hague* Convention provides:

> Notwithstanding the provisions of the preceding Article [12], 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 –
> …
>
> *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.

[47] Many of the cases dealing with the Article 13(b) exception to the general requirement to return a child to their habitual residence involve specific familial circumstances, such as domestic abuse. In this case, there is no evidence of domestic strife. Rather, the obvious

overarching safety risk in this case is the ongoing war in Ukraine. Neither the parties nor the court have been able to find any Canadian case interpreting Article 13(b) in the context of the war in Ukraine, nor do there appear to be any Canadian cases involving the application of the *Hague Convention* in any similar circumstances of ongoing warfare in the return country.

[48] In *Thomson v. Thomson,* [1994] 3 S.C.R. 551 ("*Thomson*"), La Forest J. construed the Article 13(b) exception narrowly, and for the majority wrote as follows, at pp. 596-7:

> [T]he physical or psychological harm contemplated by the first clause of art. 13(*b*) is harm to a degree that also amounts to an intolerable situation. … In *Re A. (A Minor) (Abduction),* Nourse L.J., in my view correctly, expressed the approach that should be taken, at p. 372:
>
> > … the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree ... that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'.

[49] I note that this court has cited on several occasions a decision of Boggs J. of the U.S. Court of Appeals for the Sixth Circuit, *Friedrich v. Friedrich*, 983 F. 2d 1396 (U.S. 6th Cir. 1993), for the types of situations that are encapsulated by the Article 13(b) exception:

> A grave risk of harm for the purposes of the Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - e.g. return the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.
>
> [Emphasis added.]

See, for example, *Stefanska v. Chyzynski*, 2020 ONSC 3048, at para. 70; and *Knight v. Gottesman*, 2019 ONSC 4341, at para. 90.

[50] In *Thomson*, La Forest J. also found that in circumstances where there are otherwise intolerable risks to the child in their country of habitual residence, appropriate transitionary measures consistent with the objects of the *Hague Convention* may be ordered to protect the child between the time of their return and the ability of the court in the country of habitual residence to put in place measures to protect the child: see also *Finizio v. Scoppio-Finizio* (1999), 46 O.R. (3d) 226 (C.A.), at para. 28.

[51] Although returning a child to a country that continues to suffer under an ongoing war of aggression within its territory would seem to be paradigmatic of the kind of environment that would expose the child to "physical or psychological harm or otherwise place the child in an intolerable situation," it is not sufficient to simply find that because the country is at war, the Article 13(b) exemption applies. In the very recent case of *Re N (A Child) (Ukraine: Art. 13(b))*, [2024] EWHC 871 (Fam.) ("*Re N (A Child*) No. 1"); and [2024] EWHC 1282 (Fam.) ("*Re N (A Child) No. 2")*, John McKendrick K.C., sitting as a Deputy Judge of the English High Court of Justice, considered the Article 13(b) exception in the context of the return of a child to Ukraine.

[52] The facts of *Re N (A Child)* may be summarized as follows:

- The Mother, the Father, and the child, N, are all Ukrainian nationals;
- The Mother and Father were married in September 2011;
- N was born in Ukraine in August 2012;
- N lived with his parents near a power generation facility in Ukraine;
- In February 2022, when Russia expanded its attack more broadly through eastern and central Ukraine, the parties decided that the Mother would move with N to the north of England, where they lived with a host family from July 2022 onwards;
- In October 2022, the Mother and N travelled to Ukraine to visit the Father;
- At some point the Mother formed a new relationship in England;
- The Mother wanted a divorce, and N was upset with her and her new relationship;
- N and the Mother returned to Ukraine in mid-2023, but the Mother lived separately from the Father and N;
- The Mother deceived the Father and obtained his consent to allow her to travel with N to Poland over Christmas 2023;
- The Father had commenced custodial proceedings in Ukraine, with a hearing date set;
- N expressed a strong desire to move back to Ukraine, with his father, his friends, and his dog (through Cafcass, which I understand to be the English equivalent of the Children's Lawyer in Ontario);
- The town in Ukraine where N had lived was directly affected by the war;
- The Father proposed protective measures and gave undertakings to live with N in a town in western Ukraine that had not been directly affected by the war (i.e., had not been attacked) until further order of the court in Ukraine, which the court found to provide "for a suitably robust and efficacious series of protective measures to protect N until such time as the X Town family court can consider and determine matters": *Re N (A Child) No. 2*, at para. 19.

[53] In *Re N (A Child)*, the deputy judge found that the return of N to X Town carried with it a grave risk of physical or psychological harm; however, the court ordered the return of N to Ukraine, subject to the undertakings and protective measures proposed by the Father and incorporated into the return order. In reaching its conclusion, at para. 44 of *Re N (A Child)*

No. 1, the deputy judge followed this observation in another English case involving the proposed return of a child to Ukraine, *Q. v. R.* [2022] EWHC 2961 (Fam.), at para. 54:

> It seems to me one has to avoid generalities, and in so far as is possible evaluate the particular risk to this particular child in a return to this particular area, rather than to apply a general or a broad brush; one must apply a rather more detailed and finer brush to this. Of course, if it were suggested that E were to return to Izyum [Ukraine] or one of the other areas which has just been liberated, or which may soon be more directly in an area of active war, would plainly bring with it a grave risk of harm. However, when a return is to somewhere quite different, that requires a different consideration.

[54] The deputy judge in *Re N (A Child)* also concluded that although the risk of N being a civilian casualty or fatality of a missile strike in X Town or a stray missile from an attack on an nearby power generation facility was a "low risk", it nevertheless constituted a sufficiently grave and intolerable risk of physical harm. In *Re N (A Child) No. 1*, at para. 63, the deputy judge held that,

> Whilst the risk is low, the seriousness of the harm is very grave. The court cannot allow N, a child, to return to those low risks. No child should be expected to tolerate a low risk of being put in harm's way by being maimed or killed by a stray missile or drone. It is no answer to this application to observe many Ukrainian children run that risk every day. I am focused on N, who is currently in England.

[55] I am similarly satisfied that although there are many children in Ukraine who remain at a "low risk" of becoming a casualty of war, the court's focus is only on Mariia, who is currently in Canada not facing those risks at all.

[56] In the present case, I find that there is a grave risk that returning Mariia to her habitual residence in Ukraine would expose her to physical or psychological harm or otherwise place her in an intolerable situation, and that the protective measures and undertakings proposed by Oleksii are inadequate to alleviate these risks until the Ukrainian courts would be able to consider and determine the matter. In reaching this conclusion, I make the following factual findings based on the evidence filed by the parties:

a) There is an ongoing war within the territory of Ukraine;

b) Both Kharkiv and Kiev are significant targets for Russian attacks;

c) The protective measures and undertakings proposed by Oleksii, including moving with Mariia to Kiev on a temporary basis, would not satisfactorily attenuate the risks to her physical and psychological safety, because Kiev continues to be regularly attacked by Russia;

d) In addition to the grave risks of psychological and physical harm associated with the war in Ukraine and the ongoing attacks in Kharkiv and Kiev, there is an additional intolerable risk of psychological harm associated with uprooting Mariia from the care of her mother, who has been her primary caregiver for her entire life and has expressed no intention to return to Ukraine;

e) Although Oleksii has proposed some counselling specifically to help Mariia deal with the trauma of being removed from Ukraine, he is unemployed and has not indicated how he intends to pay for it, nor has he proposed any counselling to address the psychological harm associated with the war itself, or with the harm that would result from being uprooted from her mother's care if she is returned to Ukraine; and,

f) Oleksii is exempt from military service because he cares for his elderly stepfather who is his neighbour in Kharkiv, but he has not given any evidence as to how he this significant caregiving role would be carried out if he moves to Kiev, or how he would balance it against his other caregiving responsibilities with respect to Mariia. Further on this point, Oleksii has not provided any evidence as to whether his exemption would continue if he moved to Kiev.

Conclusion

[57] For the foregoing reasons, I find that Marharyta's removal of Mariia from Ukraine was wrongful within the meaning of Article 3 of the *Hague Convention*. Notwithstanding the wrongful removal, I find that two exceptions to the immediate return of Mariia have been made out as follows:

a) Pursuant to Article 12, Mariia is now settled in her new environment in Canada; and,

b) Pursuant to Article 13(b), there is a grave risk that Mariia's return to Ukraine would expose her to physical or psychological harm or would otherwise place her in an intolerable situation.

[58] Oleksii's application for relief under the terms of the *Hague Convention* is therefore dismissed. I note that this decision is not a determination of the claims for support, decision-making or parenting time in relation to Mariia that are advanced by the respondent Marharyta in her answer in this proceeding, and those claims may now proceed to a case conference. The order of Hebner J. dated March 14, 2024, is hereby set aside.

[59] With respect to costs, it is my presumptive view that costs should follow the event, and my expectation that experienced counsel will be able to agree upon costs. If they are unable to do so, the parties may make submissions with respect to the scale and quantum of costs in writing of no more than five (5) double-spaced pages (exclusive of any costs outline, bill of costs, dockets, offers to settle, or authorities), in accordance with the following schedule:

a) Marharyta shall deliver her submissions within thirty (30) days following the release of these reasons;

b) Oleksii shall deliver his submissions within twenty (20) days following service of Marharyta's submissions;

c) Marharyta shall deliver her reply submissions, if any, which shall be limited to no more than two (2) pages, within five (5) days following service of Oleksii's submissions.

[60] If either party fails to deliver their submissions in accordance with this schedule, they shall be deemed to have waived their rights with respect to the issue of costs, and the court may proceed to make its determination in the absence of their input or give such directions as the court considers necessary or advisable.

Original signed by *Justice J. Ross Macfarlane*
J. Ross Macfarlane
Justice

Released: July 3, 2024

CITATION: Kosenkov v. Kosenkova, 2024 ONSC 3807
COURT FILE NO.: FS-24-24314
DATE: 20240703

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Oleksii Serhiiovych Kosenkov

Applicant

– and –

Marharyta Oleksanrivna Kosenkova

Respondent

REASONS FOR DECISION

J.R. Macfarlane J.

Released: July 3, 2024