



[2024] JMSC Civ 115

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2024 FD00935

**IN THE MATTER OF THE JUDICATURE
(SUPREME COURT ACT)**

AND

**IN THE MATTER OF THE INHERENT
JURISDICTION OF THE COURT**

AND

**IN THE MATTER OF THE CUSTODY
(GUARDIANSHIP & CUSTODY ACT)**

BETWEEN

JACOB SCOTT

CLAIMANT

AND

SABRINA BROWN

DEFENDANT

AND

OFFICE OF THE CHILDREN'S

INTERESTED PARTY

ADVOCATE

In Chambers

Mr. Jamaica Charles instructed by Myers Fletcher for the Claimant

**Mrs. Rhoden Jones instructed by Stewart-Harrisingh Williams and Rhoden for the
Defendant**

Mrs. Nicole Chambers Counsel for the Child Protection and Family Services Agency.

Ms Shamsi Green Counsel for the Children's Advocate.

Heard: 29th of August and 2nd of October 2024

Articles 7,29,37 and 38 of The Hague Convention- Children (Guardian and Custody Act) Amendment 2017- Sections 7E, R-Contracting Parties

SHELLY WILLIAMS, SPJ

BACKGROUND

- [1]** The Claimant is the father of three children SSS, BGS and NVS. The Claimant and the Defendant were married in Canada, and the abovenamed children were born in and are citizens of Canada. The Claimant and the Defendant lived together from 2013 and were married in 2018. The parties separated in 2023.
- [2]** Subsequent to the separation, the Defendant removed the children from Canada, and they are now residing in Jamaica. The Claimant made attempts to have the Defendant, and the children return voluntarily to Canada, but the Defendant has refused to do so.
- [3]** On the 29th of November 2022, prior to the Defendant removing the children to Jamaica, the parties entered into a Consent Order whereby the Claimant (father) was granted supervised parental time and Facetime access until the 23rd of January 2023 when the case was to be determined in the Superior Court of Justice in Ottawa, Canada.
- [4]** On April 25, 2023, the Superior Court of Justice, Family Court in Ottawa, Ontario, Canada made an order, inter alia, for the Defendant to return the Relevant Children to the City of Ottawa, Ontario by no later than May 19, 2023. The Defendant has failed to comply with this Order.

[5] The Claimant filed a Fixed Date Claim Form on the 14th of March 2024 under the Hague Convention for the return of the children. This Fixed Date Claim Form was later amended on the 2nd of April 2024. The orders being sought under the Amended Fixed Date Claim Form are that: -

- a. The Relevant Children are to be returned forthwith to the jurisdiction of the Family Court in Canada.
- b. The Defendant and/or her agents are restrained from removing the Relevant Children from this jurisdiction save only to return them to the jurisdiction of the Family Court in Canada.
- c. The relevant immigration authorities are to be served with this Order.
- d. The Fixed Date Claim Form and all other documents required to be served on the Defendant in this claim shall be served by email to sabrinambrown@qmail.com.
- e. Such further and other relief as this Honourable Court deems appropriate.

[6] A preliminary issue was raised as to whether Canada is a Contracting State with Jamaica within the provisions of the Children (Guardianship and Custody) Amendment Act, (the Children's Act). That issue was adjourned for hearing on the 29th of August 2024.

Claimant's submissions

[7] Counsel for the Claimant argued that the Fixed Date Claim was filed pursuant to Section 7 the Children's Act. The Claim was made for the return of the children who, the Claimant averred, are being wrongly retained in Jamaica. The amendment to the Children's Act allowed for an application to be made for the return of the relevant children. Counsel acknowledged that there was no mutual recognition in respect of the Hague Convention between the parties, however, he

submitted that Canada is still a Contracting State according to the Children's Act. Counsel relied on a various section of the Children's Act, as well as the cases of **Gentles v Carr** [2019] JMCA Civ 31 and **The Sussex Peerage Case** (1844) 8 ER 1034, to support his position.

- [8] There was an additional issue that was raised by Counsel for the Claimant i.e. that the Claimant had standing to file the Fixed Date Claim. He argued that such Claims were usually advanced by the Central Authority, however Section 7R of the Children's Act, allowed the Claimant to personally approach the Court for the return of retained children.

Defendant's Submissions

- [9] The Defendant argued that the pre-requisites for the Claim to be filed under the Children's Act had not been satisfied. Counsel for the Defendant submitted that there were seven variables that had to be satisfied for a Claim to be deemed a Claim under the Hague Convention, namely:

1. The child has been wrongfully removed from Canada;
2. The child is under 16;
3. The child was habitual resident in the contracting state prior to the abduction;
4. The international travel was a violation of the party's custody rights;
5. The abduction occurred when the other parent was exercising their custody rights;
6. The removal clause in the custody order was violated; and
7. The Convention was in force between the nations at the time of the abduction.

[10] Counsel further submitted that Canada was not a Contracting State with Jamaica and as such this could not be deemed as a case under the Hague Convention.

Submissions of Child Protection and Family Services Agency (CPFSA)

[11] Counsel for the CPFSA submitted that the Court has no jurisdiction to grant the requested orders as per the Fixed Date Claim Form. Counsel for the Central Authority argued that Canada had not accepted Jamaica as a Contracting Party and as such the Court would be unable to make any orders for the return of the children in question under the Hague Convention/Children's Act.

[12] Counsel relied on the on Articles 37 and 38 of the Hague Convention which had been adopted in Jamaica as per the Children's Act.

The submissions by the Children's Advocate

[13] The Children's Advocate indicated that they are a proper party to the Amended Fixed Date Claim Form as they are a Statutory Body, and this application is beyond their remit. Counsel for the Children's Advocate made similar submissions as the Counsel for the CPFSA, arguing that Canada and Jamaica are not Contracting States as per Articles 37 and 38 of the Hague Convention. Counsel urged the Court to adopt the position of Lady Hale in the case of **In the matter of J (a child)** [UKSC] 70 (**Re J**).

Law and Analysis

[14] The Children's Act was amended in 2017 and now incorporates the Hague Convention on the Civil Aspects of International Child Abduction 1980 entered into force on the 1st day of December 1983 (Hague Convention). The Children's Act defines Contracting States as:

State that is a party to the Convention

[15] The interpretation section of the said Children's Act goes on to define Requesting States as: -

in relation to a child that is the subject of an application pursuant to section 7F, means: -

(a) *the Contracting State in which the child is habitually resident;*
or

(b) *any other Contracting State from or in which the child has been unlawfully removed or retained;*

[16] The question that arises in this application is who is a Contracting State as per the Hague Convention? The methodology on becoming a Contracting State is not detailed in the Children's Act. The Children's Act refers to The Hague Convention that lays down: -

(a) the ratification procedure by which a country can become a Contracting State to the Convention,

(b) the method by which each Contracting State can then accede and accept each other.

[17] Article 37 of the Hague Convention speaks to the ratification procedure. It states that:

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

[18] Article 38 of the Hague Convention details the procedure by which Contracting Parties to the Convention can then accede and accept each other. It states that: -

Any other State may accede to the Convention. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States. The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

[19] In the absence of the completion of the two abovementioned steps, the two countries cannot be deemed to be Contracting States. The countries that have acceded and accepted each other as signatories to the Hague Convention can be ascertained from the Hague Convention website and the Ministry of Foreign Affairs. This information concerning who has acceded and accepted Jamaica was attached to documents filed by the CPFSA. Although Jamaica and Canada have been ratified as signatories to the Hague Convention, Canada has not acceded and accepted Jamaica as per Article 38, and as such they are not Contracting Parties.

[20] The case of **Re J** demonstrates the approach to adopted when countries have not acceded and accepted each other as Contracting Parties. In that case the child in question was born in England to Moroccan parents. The parties were married in 2005 and moved to Morocco in 2011. The husband-initiated divorce proceedings in 2011 and during the proceedings the mother was granted residential custody with the father being granted visitations on Sundays and holidays. The mother moved to England, remarried and moved the child to reside in England. The father applied to the Family Court in the district that the child had been living to revoke the custody order and his application was refused. The father applied to the High Court for the child to be made a ward of the State and for the child to be returned to Morocco. Lady Hale in paragraph 8 of the decision stated: -

Although Morocco has acceded to the 1980 Hague Convention on the Civil Aspects of International Child

*Abduction (“the 1980 Convention”), that accession has not yet been accepted by the European Union, and thus by the United Kingdom. The case therefore proceeded before Roderic Wood J as an application under the inherent jurisdiction of the High Court: [2014] EWHC 3588 (Fam). He referred (at para 1) to the proceedings also having been brought under the 1996 Convention, and mentions that his attention had been drawn to articles 5, 7, 19 and 22 (but not 11) of Page 4 that Convention. However, in his section headed “The law”, he refers only to article 22, which deals with applicable law, and not with jurisdiction. He dealt with the case as a straightforward application of the principles applicable to such “non-Hague” applications for summary return, as contained in the decision of the House of Lords in *In re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80.*

[21] Canada has not acceded to Jamaica as a Contracting State under the Hague Convention. In light of that the Court would have no jurisdiction to embark on an application under The Hague Convention with regards to the return of the relevant children.

[22] There was one other issue that had been raised i.e. whether the Central Authority must be engaged with regards to the return of wrongfully retain children. The usual method by which requests are made for the return of these children is through the Central Authority. Article 7 of the Hague Convention refers specifically to Central Authority and the role they play in these proceedings. Article 7 states:

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

[23] The Hague Convention, however, clearly allows for claims to be filed by persons without any assistance or reference to the Central Authority. Article 29 states: -

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

[24] Articles 7 and 29 have been incorporated into the Children's Act. Article 7 is detailed in Section 7E of the Children's Act, whilst Article 29 is reflected in Section 7R. The wording of Section 7R is worded slightly differently from Article 29. It states:

Where a person, institution or body claims that a child has been wrongfully removed or retained or that there is a breach of rights of custody or right of access, the person, institution or body, shall not be precluded from applying directly to the judicial or administrative authorities of a Contracting State for the appropriate relief.

[25] In the event Canada had been a Contracting Party, the Claimant would have had the standing to file the Fixed Date Claim Form.

[26] I find that the Court has no jurisdiction to make any orders relating the abovementioned children under the Children's Act which incorporated the Hague Convention. Canada has not acceded to Jamaica becoming a member of the Hague Convention and as such the orders being sought for the return of the children under the Children's Act cannot be granted.