Child Abduction and Habitual Residence in the Supreme Court of Canada

The Supreme Court of Canada, in *Office of the Children's Lawyer v Balev* (available here), has evolved the law in Canada on the meaning of a child's habitual residence under Article 3 of the Hague Convention. The Convention deals with the return of children wrongfully removed from the jurisdiction of their habitual residence.

A majority of the court identifies [paras 4 and 39ff] three possible approaches to habitual residence: the parental intention approach, the child-centred approach, and the hybrid approach. The parental intention approach determines the habitual residence of a child by the intention of the parents with the right to determine where the child lives. This approach has been the dominant one in Canada. In contrast, the hybrid approach, instead of focusing primarily on either parental intention or the child's acclimatization, looks to all relevant considerations arising from the facts of the case. A majority of the court, led by the (now retired) Chief Justice, holds that the law in Canada should be the hybrid approach [paras 5 and 48]. One of the main reasons for the change is that the hybrid approach is used in many other Hague Convention countries [paras 49-50].

The dissent (three of the nine judges) would maintain the parental intention approach [para 110]. One of its central concerns is the flexibility and ambiguity of the hybrid approach [para 111], which the judges worry will lead to less clarity and more litigation. Wrongful removal cases will become harder to resolve in a timely manner [paras 151-153].

The majority did not apply the law to the facts of the underlying case, it having become moot during the process of the litigation [para 6]. The court rendered its decision to provide guidance going forward. The dissent would have denied the appeal on the basis that the child's habitual residence was in Germany (as the lower courts had held).

The court briefly addresses the exception to Article 3 in what is commonly known as "Article 13(2)" (since it is not numbered as such) – a child's objection to return

– setting out its understanding of how to apply it [paras 75-81 and 157-160].

The Supreme Court of Canada has recently adopted the practice of preparing summaries of its decisions (available here for this decision) to make them more accessible to the media and the public. These are called “Cases in Brief”.