Supreme Court of Canada on International Child Abduction

Written by Stephen G.A. Pitel, Faculty of Law, Western University

The Supreme Court of Canada has released its decision in *F v N*, 2022 SCC 51 (available here) and the decision offers some important observations about the law on international child abduction. The court held 5-4 that two young children taken by their mother from UAE to Ontario are to be returned to their father in UAE.

The father and mother were engaged in a dispute over custody rights of the children. The court noted that in the removal/return context, it was not deciding the custody issue but rather deciding which court – Ontario or UAE – would decide that issue [para 1]. Because UAE is not a party to the *Convention on the Civil Aspects of International Child Abduction*, the issue of whether the children should be returned to UAE arose under Ontario legislation (*Children's Law Reform Act*, RSO 1990, c C.12), though the court noted similarities between the two regimes [para 52].

The majority decision offers several observations as to the law, and the dissent does not directly disagree with them. First, while consideration of the best interests of the children is paramount, the Ontario legislation, as structured, presumes that their best interests are aligned with their prompt return to their habitual residence [paras 9, 63-64]. As a result the court should not conduct a broad best-interests inquiry [para 65]. Second, while the legislation would allow return to be refused in a case in which the child would thereby suffer serious harm (see s 23), the burden of showing this is "demanding" [para 69]. The analysis must be "highly individualized" and not a general assessment of the society to which the children would be returned [para 72]. Third, there is no absolute rule that serious harm will always be established as a result of separating young children from their primary caregiver [paras 77-78].

The majority finds that the trial judge found no risk of serious harm and that this conclusion is entitled to appellate deference [para 103]. In stark contrast, the dissent finds the trial judge "misapprehended the evidence" and so made

“material errors” in assessing the risk of serious harm [paras 142-43]. At one level the dissent’s concern is with the quality of the trial judge’s reasons about the key issues. It notes that in the 482 paragraph decision only 8 paragraphs addressed the application of the serious harm exception to return as applied to these facts [paras 148-49]. It finds that the reasons give rise to a reasoned belief that the trial judge “must have forgotten, ignored or misconceived the evidence” [para 157]. Absent such a misapprehension of the evidence, a particular conclusion by the trial judge is said to be “inexplicable” [para 185].

Moving beyond the dissent’s concerns about the trial judge’s reasons, the dissent concludes that the mother met her burden of establishing a risk of serious harm if the children were returned to UAE [para 147]. This appears to be centrally based on the view that the children would thereby be removed from their primary caregiver [paras 173, 179]. The dissent does not find that any of the other factors in play sufficiently reduce this central concern.

The majority appears motivated not to create precedent for a rule or even “near-rule” that young children should not be separated from their primary caregiver through a return because this would subvert the scheme of the legislation and make Ontario something of a haven for abducting parents [para 78]. The dissent claims its decision would not create such a rule [para 194] but it is open to debate how far along a path towards such a rule it travels.

The decision is also interesting for its discussion of the use of undertakings given by the party seeking return of the children in order to make it easier for the court to agree [paras 98, 129-36]. The court notes that there can be enforcement problems relating to such undertakings and discusses potential solutions to these problems.

Finally, there was some argument that the law of UAE should have played a role in refusing return. The majority is clear: the mother’s “characterization of UAE law as an inherent source of serious harm must be rejected” [para 10]. The trial judge found that in the UAE the best interests of the child would be paramount in a custody determination and that decision was entitled to deference on the appeal [paras 11, 84-92]. The dissent did not engage with this issue.