SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Yonis v. Garado, 2011 NSSC 110

Date: 20110316
Docket: SFHMCA-072415
Registry: Halifax

Between:

Jemal Yonis

Petitioner

v.

Ekram Garado

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	March 14, 2011
Written Decision:	March 18, 2011
Counsel:	Krista Forbes on behalf of Ekram Garado Susan Young and José Rodriquez, student at law, on behalf of Jemal Yonis

By the Court:

Introduction:

[1] Jemal Yonis and Ekram Garado are the parents of three children. Mr. Yonis and Ms. Garado married in April 1998 in Ethiopia. Their older daughter was born in 2002. Mr. Yonis and other members of his family were detained and tortured in Ethiopia because they are members of the Oromo ethnic minority. Approximately eight years ago, the couple and their older daughter left Ethiopia to escape this persecution: they went to a refugee camp in Kenya. They were United Nations High Commissioner-assisted refugees. Their younger daughter was born in the refugee camp in 2006. In May 2008 the family moved to Halifax. Their son was born in Halifax in August 2009.

[2] In late June 2010, Mr. Yonis drove Ms. Garado and the children to the airport. Ms. Garado and the children were going to Edmonton for a three week visit with Ms. Garado's brother. Mr. Yonis had no contact with his wife or children until approximately four weeks later when they were one week past their expected date of return. Mr. Yonis now speaks with his daughters weekly, but he has not spoken with his wife. On September 27, 2010 the girls told their father that their mother was planning on taking them back to Ethiopia. This disclosure made Mr. Yonis very concerned. The children share his ethnic background and he feels they will experience the same persecution he has experienced.

[3] On October 12, 2010, Mr. Yonis filed an application under sections 9 and 18 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 for child maintenance, custody and access. Initially scheduled for hearing on November 4, 2010, the application was re-scheduled to December 14, 2010 to allow Ms. Garado to be served in Edmonton. In December, Mr. Yonis agreed the application would be further adjourned to allow Ms. Garado time to retain and instruct counsel. In the interim, it was also agreed that Ms. Garado would not remove the children from Canada without her husband's permission or a court order. A date was scheduled for the matter’s return.

This motion

[4] Mr. Yonis filed an affidavit and parenting statement in support of his parenting and maintenance application. These were served on Ms. Garado. Ms. Garado has filed no documents. She has not filed a motion to challenge the jurisdiction of this court. She has not filed an affidavit in support of her request that I decline jurisdiction to hear her husband's application. Though no motion was filed to contest my jurisdiction to hear Mr. Yonis' application, each party filed briefs and made submissions on that issue. She asks that I decline jurisdiction and instruct Mr. Yonis to file his application in Edmonton.

The legal framework

[5] The procedure for determining jurisdiction was most recently enunciated by our Court of Appeal in *Bouch v. Penny*, 2009 NSCA 80 (leave to appeal this decision to the Supreme Court of Canada was dismissed on March 25, 2010 at 2010 CanLII 14708). *Bouch v. Penny* was the Court of Appeal's first decision pursuant to the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2d Sess.), s. 2.

[6] In *Bouch v. Penny*, 2009 NSCA 80, Justice Saunders, with whom Justices Roscoe and Oland concurred, approved of the two-step analysis Justice Wright performed in deciding the application at first instance. Justice Wright said, at paragraph 40 of his decision in *Penny v. Bouch*, 2008 NSSC 378, that where there's a dispute over assumed jurisdiction, the *Court Jurisdiction and Proceedings Transfer Act* requires I must first determine whether I can assume jurisdiction, given the relationship between the subject matter of the case, the parties and the forum. If that legal test is met and I can assume jurisdiction, I must then consider whether I ought to assume jurisdiction. He said this means considering the discretionary doctrine of *forum non conveniens*. There may be more than one forum capable of assuming jurisdiction and I may decline to exercise jurisdiction because there is another, more appropriate, forum.

Can I assume jurisdiction?

[7] Part I of the *Court Jurisdiction and Proceedings Transfer Act* determines the court's territorial competence. Section 4 of the *Act* provides that only in certain circumstances does the court have territorial competence in a proceeding brought against a person. The only one of those circumstances that could apply in this case is section 4(e) of the *Act* which refers to circumstances where there is a real and substantial connection between this province and the facts on which the proceeding against that person in based.

[8] "Real and substantial connection" is presumed to exist in twelve different categories that are enumerated in section 11 of the *Act*. Those are not the only circumstances where a real and substantial connection may exist: they are simply the categories where there is a legislated presumption of real and substantial connection. This is clear from the opening clause of section 11 which explicitly says that the section does not limit "the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between" Nova Scotia and the facts on which a proceeding is based.

[9] There is no legislated presumption of real and substantial connection in this case. So, I must return to the factors articulated in the common law to determine whether there is a real and substantial connection between Nova Scotia and the facts on which Mr. Yonis' case is based.

[10] The *Maintenance and Custody Act* does not state a basis for jurisdiction. At common law, a court has jurisdiction in a parenting application where the child is present, resident or domiciled in the jurisdiction when the proceedings were begun.

[11] The couple's three children have been present and resided in Edmonton since late June 2010 when they traveled there with their mother to visit their uncle. As a result, jurisdiction is only available if the children remain domiciled in Halifax, despite their present residence. Domicile refers to the children's permanent home, the place to which they'd return from an absence.

[12] Prior to late June 2010 and since May 7, 2008 the children lived with their parents in Halifax. Halifax was their domicile. At issue is whether the children's travel to Edmonton with their mother and their subsequent stay in Edmonton has displaced Halifax as their domicile.

[13] There is no contest from Ms. Garado that Halifax remained the children's domicile when they first arrived in Edmonton. She doesn't contest the proposition that domicile cannot be changed by one parent unilaterally and she doesn't contest the proposition that consent to a temporary removal is not consent to a permanent removal. Ms. Garado argues that once the children had over-stayed the expected three week visit, Mr. Yonis acquiesced to Edmonton becoming the children's new domicile. She further argues that Mr. Yonis was aware his older daughter wasn't attending school in Halifax when September came and he did nothing about this. She argues that Mr. Yonis did not object to the children's new domicile until he learned that she planned to return to Ethiopia on September 27, 2010.

[14] In *Bedard*, 2004 SKCA 101 the Saskatchewan Court of Appeal addressed the issue of whether Mr. Bedard acquiesced to his children's living in Saskatchewan with Mrs. Bedard. In *Bedard*, 2004 SKCA 101, the children had been taken from British Columbia to Saskatchewan surreptitiously. Within seventeen days of the children's departure, Mr. Bedard had obtained an *ex parte* order granting him interim custody of the children and ordering their return to British Columbia. However he didn't serve this order on his wife until almost seven weeks later. Section 15(2)(b) of Saskatchewan's *Children's Law Act*, 1997, S.S., 1997, c. C-8.2 provides that its courts have jurisdiction in custody actions between separated parents where the child lives with one parent with the other parent's acquiescence.

[15] At trial, Justice Kraus accepted that the delay in notifying Ms. Bedard about the British Columbia order "impinged her right" to apply to set the order aside and led her "to believe that [Mr. Bedard] was not asserting his right to the summary return of the children": 2004 SKQB 1 at paragraph 11. This conclusion was overturned by the Court of Appeal. At paragraph 38 of the appellate decision, Justice Tallis, with whom Chief Justice Bayda and Justice Jackson concurred, concluded that the "delay in the circumstances of this case **does not** constitute 'clear and cogent evidence of unequivocal consent or acquiescence'. [emphasis added]" His Lordship noted that during the weeks when Mr. Bedard had the custody order and Ms. Bedard did not, the Bedards were discussing the children's voluntary return to British Columbia and Mr. Bedard and his British Columbia lawyers were involved in arranging to instruct counsel in Saskatchewan. As well, Justice Tallis said it was fair to infer that Mr. Bedard was seeking to reconcile with his wife during this period.

[16] The burden is on Ms. Garado to prove Mr. Yonis acquiesced to Edmonton becoming the children's new domicile. As Associate Chief Justice Osborne, with whom Justices Laskin and Feldman concurred, said at paragraph 49 of *Katsigiannis v. Kottick-Katsigiannis* 2001 CanLII 24075 (ON C.A.), "the mother must show some conduct of the father which is inconsistent with the summary return of the children to their habitual residence."

[17] Ms. Garado argues that the conduct which is inconsistent with the summary return of the children to Halifax is Mr. Yonis' delay in making his application to the Family Division. So, it's for Ms. Garado to show that there was delay on Mr. Yonis' behalf. This is a difficult burden for her to discharge where she has offered no evidence.

[18] I say that it is for Ms. Garado to show there was delay on Mr. Yonis' behalf. Mr. Yonis argues he began his custody application when he learned from the girls on September 27, 2010 that their mother planned to take them to Ethiopia. This was clear notice to Ms. Yonis that the move from Halifax was to be permanent and Halifax was no longer to be the children's domicile. Mr. Yonis acted promptly when he learned that Ms. Garado intended to relocate the children's domicile from Halifax.

[19] Until September 27, 2010, it isn't clear that Mr. Yonis knew that the stay in Edmonton was anything other than a much-extended visit by his wife and their children with his brother-in-law. Admittedly, it was a visit that had extended into the school year, but it isn't clear that Mr. Yonis understood the children were not to return to their home in Halifax. In this regard, this case differs from *Bedard*, 2004 SKQB 1 (rev'd at 2004 SKCA 101), where Ms. Bedard's departure from British Columbia was surreptitious and could not be mistaken for a temporary visit or vacation, and from *N.R.R. v. D.E.A.F.*, 2009 NSFC 4 at paragraph 9, where the mother left Nova Scotia for British Columbia and the parties knew this was a permanent move.

[20] For Mr. Yonis to have acquiesced in the children's domicile being changed to Edmonton, he must have known this was happening. It is clear - even from the Statement of Contact Information and Circumstances that Mr. Yonis filed with the court - that while Mr. Yonis understands he is now separated from his wife, he does not know when this happened.

[21] The evidence I have from Mr. Yonis is that when the children and their mother left for Edmonton in late June 2010, they were leaving for a three week visit. He says that for approximately four weeks following their departure, he had no contact with his wife or children. At some point thereafter, he came to have weekly conversations with the children. I have not been told when this began. Mr. Yonis says that he has not spoken with Ms. Garado. In his affidavit, Mr. Yonis states, "I understand from my wife, and do verily believe it to be true that she has no plans of returning to Halifax with the children." Based on the evidence I have, it appears that this understanding stems from the children's revelation that their mother was planning to take them back to Ethiopia.

[22] In addition to talking with his children, while the children have been in Edmonton, Mr. Yonis has sent money to the children for their birthdays and on Muslim holidays. On these three

occasions (which I assume to be his older daughter's birthday, his son's birthday and the end of Ramadan), he has sent a total of $1,200.00. There is no suggestion by Ms. Garado that these payments were an acknowledgement by Mr. Yonis of his obligation to pay child maintenance where he and his wife were separated.

[23] Mr. Yonis' application is pursuant to the *Maintenance and Custody Act*, not the *Divorce Act*, R.S.C. 1985 (2nd Supp), c. 3. While proceeding under the *Divorce Act* has the advantage of utilizing legislation which is common to Nova Scotia and Alberta, Mr. Yonis could only avail himself of that *Act* if there was a request for a divorce. Here, he proceeds under the *Maintenance and Custody Act* which does not require the parties be pursuing a divorce.

[24] I do not have clear and cogent evidence that Mr. Yonis acquiesced to the children's domicile being changed from Halifax. Ms. Garada has not shown conduct by Mr. Yonis which is inconsistent with the summary return of the children to Halifax.

[25] Accordingly, I conclude that I can assume jurisdiction in this application. This conclusion means I must consider whether I ought to assume jurisdiction. As I've noted this means considering the discretionary doctrine of *forum non conveniens*. There may be more than one forum capable of assuming jurisdiction. I may decline to exercise jurisdiction because there is another, more appropriate, forum.

Ought I assume jurisdiction?

[26] Section 12(2) of the *Court Jurisdiction and Proceedings Transfer Act* says that in deciding the more appropriate forum in which to hear a proceeding, I must consider the circumstances relevant to the proceeding, including:

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

(b) the law to be applied to issues in the proceeding;

(c) the desirability of avoiding multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole.

Convenience and expense

[27] The family moved to Halifax in May 2008. At that time, their older daughter was almost six years old. She began grade primary in Halifax. She continued her education in Halifax, attending the same school until she completed grade two before going to Alberta last June. She was to begin grade three this past September. Their younger daughter was two years old when the family arrived in Halifax. In Halifax, she attended daycare at the Metropolitan Immigrant Settlement Association. She turned five last month and doesn't yet attend school. Their son was born in Halifax in August 2009 and traveled to Alberta when he was ten months old.

[28] I'm told that there is a significant Oromo community in the Fairview area and that the family is connected with that community and received "much support" from this community when they arrived in Nova Scotia.

[29] In addition to their engagement with the local Oromo community, their older daughter's school and their younger daughter's daycare, Mr. Yonis was involved with the Refugee Assistance Program and the Nova Scotia Community College. He is currently employed by Casino Taxi. There are a number of connections between the family and the local community. Mr. Yonis says that he would have four or five witnesses offer evidence at a trial.

[30] Ms. Garado has been in Edmonton since late June 2010. She, too, anticipates four to five witnesses at a trial. Her submissions were unclear as to whether she counted herself in this number. The witnesses would include Alberta-based family and a case worker who checks on the children in Alberta. I'm told these witnesses are located in Alberta, which means that these witnesses would not likely be offering evidence about the children or the family's circumstances in Nova Scotia. As well, some of the witnesses, such as the case worker, would have knowledge that dates only since Ms. Gerado and the children have been in Alberta.

[31] There will be expense and inconvenience to each parent if he or she is compelled to litigate in the other forum. In this court it is possible to have witnesses testify by way of video conferencing. In both locations, an Amharic translator would be needed for Ms. Yonis and, possibly, for some of her witnesses.

[32] On balance, it appears the witnesses who have more to say about the girls and the family are available in Halifax. While the children are in Alberta, their ages (from one to eight years old) suggest that their views may lack the weight that the views of older children's.

The applicable law

[33] The applicable law in Nova Scotia is found in the *Maintenance and Custody Act* which provides in section 18(5) that "In any proceeding under this *Act* concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration."

[34] Ms. Garado cannot bring an application in Alberta under the *Divorce Act*: she lacks the ordinary residence necessary to do so. Any application she wished to bring for the children's

custody in Alberta would be pursuant to that province's *Family Law Act*, S.A. 2003, c. F-4.5. Section 18 of that *Act* provides that "In all proceedings under this Part, the court shall take into considerations only the best interests of the child." The Part referred to in section 18 is the portion of the *Act* dealing with guardianship, parenting and contact orders, and enforcement. I do note that section 18(2) of the *Act* enumerates a number of considerations to which regard must be had in determining what is in the child's best interests. These considerations (the child's cultural, linguistic, religious and spiritual upbringing, the child's views and preferences, any plans for the child's care and upbringing) echo the considerations before this court from Justice Goodfellow's decision in *Foley*, 1993 CanLII 3400 (NS S.C.).

Avoiding multiplicity of legal proceedings

[35] At this point, the only proceeding is Mr. Yonis' application before this court.

Enforcement of an eventual judgment

[36] Mr. Yonis' application is pursuant to the *Maintenance and Custody Act* and that an Alberta application would be grounded in the *Family Law Act*. Both provinces have legislation enabling the recognition and enforcement of foreign custody orders. In Nova Scotia, we have the *Reciprocal Enforcement of Custody Orders Act*, R.S.N.S. 1989, c. 387. Alberta has been a reciprocating state under that legislation since September 1977. Alberta has the *Extra-provincial Enforcement of Custody Orders Act*, R.S.A. 2000, c. E-14. An eventual judgment from either jurisdiction would be enforced with equal ease in the other jurisdiction.

Fairness and efficiency

[37] In *Bouch v. Penny*, 2009 NSCA 80, Justice Saunders highlighted the difference between unfairness and inconvenience. He explained, at paragraph 77, that "[i]nconvenience typically reflects concerns such as increased, unnecessary expense; time tabling difficulties; disruption to other obligations owed by parties and witnesses, and the like." In contrast, he said that unfairness was broader, including the concepts of equity, the parties' interests and the interests of other similarly situated litigants, fairness and comity.

[38] Mr. Yonis argues that more than inconvenience, he faces unfairness: he began his application in Nova Scotia in mid-October 2010. He has filed his affidavit and Parenting Statement and he has attended the Parent Information Program. Ms. Garado has not begun any court process in Alberta. If I do not assume jurisdiction, then Mr. Yonis will have lost almost six months in his pursuit of a parenting and child maintenance order. Whether it's Mr. Yonis or Ms. Garado who begins an application in Alberta, that court process will be at its beginning. Both parties have counsel in Nova Scotia. There may be additional delay in Mr. Yonis seeking counsel in Alberta. Here, the children are young and the passage of time undermines their relationship with their father and roots them in Alberta. I agree that this is a concern of fairness and Mr. Yonis would experience unfairness if I declined to assume jurisdiction.

[39] In light of all these considerations, I conclude this is a case where I have jurisdiction and I ought assume jurisdiction to ensure fairness and the availability of the best evidence to determine the children's custody.

_____

Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia