Docket: 2009-2603(IT)I

BETWEEN:

FATME CHARAFEDDINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 23, 2010, at Montreal, Quebec

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant:	Deborah Mankovitz
Counsel for the Respondent:	Me Marie-Claude Landry
Student-at-Law:	Sara Jahanbakhsh

JUDGMENT

The appeals from the Notices of Determination dated February 20, 2009 made under the *Income Tax Act* for the periods July 2006 to June 2009 with respect to Canada Child Tax Benefit and the Goods and Services Tax Credit are allowed and the assessments are vacated.

Signed at Ottawa, Canada, this 6th day of August 2010.

"G.A. Sheridan"

Sheridan J.

Citation: 2010TCC417
Date: 20100806
Docket: 2009-2603(IT)I

BETWEEN:

FATME CHARAFEDDINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The only issue in this Informal Procedure appeal is whether the Minister of National Revenue correctly determined that the Appellant was overpaid Canada Child Tax Benefits and GST Credits for the 2005, 2006 and 2007 base taxation years, a period extending from July 2006 to June 2009 (the "Period").

[2] At the root of this appeal is the abduction by the Appellant's former spouse, Safi Ahmed Ghaddar, of the Appellant's two daughters during a holiday in Lebanon in September 2004. Both children were born in Ottawa, Canada. At the time of the abduction, they were 6 and 3.

[3] Upon their arrival at the Lebanese airport, Mr. Ghaddar attempted to make off with both girls to his parents' residence. As it happened, he managed to take only one; the other went with the Appellant to the home of her parents. After frantic conversations back and forth, the Appellant was persuaded to go with her daughter to his parents' house to try to work things out. This proved a disaster. At a certain point, the Appellant managed to flee with her daughters to the airport in an attempt to return to Canada. Mr. Ghaddar, however, was already one step ahead of her and airport officials blocked their departure. The girls were returned to their father. The Appellant reported to the Embassy of Canada in Beirut. She remained in Lebanon for nearly a year trying to find a legal means in that country for them to return to Canada. She was ultimately unsuccessful. In September 2005, the Appellant came home

alone, bent on availing herself of the Canadian legal system to effect her daughters' safe return.

[4] As of the date of this hearing, Mr. Ghaddar was continuing to detain the children in Lebanon. He sought and apparently was granted an order in the Lebanese religious court requiring the Appellant, among other things, to "abide by her husband *(sic)* rules and to return to live with him under the same roof and to practice her conjugal duties…"[1].

[5] On purely humanistic grounds, most would say the appeal ought to be allowed. From a legal perspective, however, that outcome is possible only if the Appellant can show that she has satisfied the criteria under the *Income Tax Act.* Specifically, the Appellant must meet the requirements of an "eligible individual" as defined under section 122.6:

> "eligible individual" in respect of a qualified dependant at any time means a person who at that time
>
> (*a*) resides with the qualified dependant,
>
> (*b*) is the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing of the qualified dependant,
>
> …
>
> (*h*) prescribed factors shall be considered in determining what constitutes care and upbringing;

[6] For both the CCTB and the GSTC, the children must have resided with her during the Period; her eligibility for the CCTB depends on the additional criterion of whether she was the parent who "primarily fulfilled the responsibility" for her daughters' "care and upbringing" during the Period.

[7] The Minister's view is that because the children were not physically in Canada, it cannot be said that they were resident with the Appellant or that the Appellant was primarily responsible for their care. While acknowledging the wrongful quality of Mr. Ghaddar's actions and the effect of his "lack of co-operation", counsel for the Respondent submitted that the children were nonetheless "settled" in Lebanon and accordingly, the Appellant could not satisfy the "eligible individual" critieria.

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[1] Exhibit A-1.

[8] In the unusual circumstances of this appeal, I do not find that argument persuasive. There is something fundamentally flawed with the notion that children wrongfully detained in a foreign country can be "settled" there.

[9] Testifying for the Appellant was the Appellant herself along with Anne Bourdeau and Angela Faraoni. Ms. Bourdeau is an official with the Department of Foreign Affairs and International Trade Canada ("DFAIT") who ultimately took over the Appellant's file in respect of her abducted children. Ms. Faraoni is a counsellor at the shelter for battered women where, for a time after her return to Canada, the Appellant sought refuge and guidance. Their testimony went unchallenged by the Respondent. I found all three women were credible in their evidence. No witnesses were called for the Respondent.

[10] On the question of residency, the starting point is the Minister's own assumption that the Appellant and her family had gone to Lebanon for a holiday. Whatever Mr. Ghaddar's plans may have been, I accept the Appellant's evidence that she and her children had every intention of returning to Canada. The girls were registered for school in the fall. The family's fully furnished apartment and car awaited their return. No steps had been taken to terminate the lease on the apartment.

[11] As it happened, the Appellant could not return to Canada as scheduled because she did not want to leave her children in Lebanon. Her contact at the Canadian Embassy was Jean-Marc Lesage, at that time the official responsible for DFAIT's "Our Missing Children" Program. He became involved in the file as of April 11, 2005[2]. His affidavit supports the Appellant's evidence of her attempts to obtain custody of her children under Lebanese law were unsuccessful.

[12] When finally the Appellant returned to Montreal in September 2005, she discovered that the landlord had exercised his rights over the family's apartment and disposed of their goods and furnishings. Because Mr. Ghaddar had insisted that the Appellant work in his restaurant business, she had no job to return to. Finding herself out on the street, the Appellant turned to the women's shelter where Ms. Faraoni provided counselling and advised her on financial matters. She helped the Appellant to get social assistance to support herself and her efforts to get her daughters back and assisted her in trying to contact her children, to pursue legal actions and to post her daughter's information on the missing children's website[3].

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[2] Affidavit Jean-Marc Lesage filed in support of Exhibit A-1, "Plaintiff's Motion to Issue a Special Rule Ordering the Defendant to Appear for an Accusation in Contempt of Court".

[3] Exhibit A-12.

[13] Her efforts eventually began to bear fruit. Just prior to the commencement of the Period, on April 20, 2006, the Appellant obtained an interim judgment from the Superior Court of Quebec[4] (made final October 17, 2007[5]) confirming Quebec, Canada as the habitual residence of the Appellant and her two children and granting custody of them to the Appellant. Although she caused these orders to be served on Mr. Ghaddar in Lebanon, he maintained an attitude of unwavering of non-compliance in the face of the orders of the Canadian courts.

[14] Throughout the Period, the Appellant continued to fight for the return of her children. On February 3, 2009, the Superior Court of Quebec, after reviewing much of the same evidence relied upon by the Appellant in the present appeal, pronounced Mr. Ghaddar in contempt. In reaching this conclusion, Justice Petras stated that "… the evidence also clearly shows beyond a reasonable doubt that [Mr. Ghaddar] is refusing to cooperate in any fashion whatsoever with respect to this matter and has expressly decided to ignore the judgments and orders of this Superior Court"[6].

[15] In these circumstances, I have no difficulty in finding that the children were legally resident with the Appellant. During the Period, they were simply too young, too small and too vulnerable to have had any say in the matter of their residency. But for their father's wrongful detention of them in Lebanon, the little girls would have been physically present in Canada; but for his illegal abduction, in their mother's care; but for his contempt, in her sole custody. In these circumstances, to find that the children are "resident" in Lebanon would be tantamount to condoning Mr. Ghaddar's illegal acts thereby bringing the administration of justice into disrepute. At all times during the Period (and indeed, to the present day) the Appellant has been the girls' safe harbour. Their residence is with her.

[16] In reaching this conclusion, I am mindful that the definition of "reside", meaning "to live in the same house as"[7], is more typically applied in CCTB decisions. But there are some cases where, in the unusual circumstances of the case, the Court has found residency to exist even when the parent and child were not physically present in the same abode: in *Bouchard v. R.* [8], for example, where the

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[4] Exhibit A-4.

[5] Exhibit A-5.

[6] Exhibit A-7.

[7] *Burton v. R.*, [2000] 1 C.T.C. 2727; *S.R. v. R.*, [2004] 1 C.T.C. 2386; *Callwood v. R.*, [2004] 2 C.T.C. 2801.

[8] [2009] 4 C.T.C. 2006

father was incarcerated; in *Penner v. R.* [9], where the child was at boarding school; and in *Attia v. R.* [10], where the children were also abducted[11]. Residency is a question of fact that can only be decided in the particular circumstances. The legislative objective of putting financial resources in the hands of the parent upon whom the children are dependent for their care and well being must also be respected. In the present matter, the only person fulfilling that role was the Appellant.

[17] The next question is whether the Appellant was the parent who primarily fulfilled the responsibility for the care and upbringing of the children. Under paragraph (*h*) of the definition, to determine whether the Appellant is the primary caregiver, the Court must consider the prescribed factors set out in section 6302 of the *Income Tax Act Regulations;*

> For the purposes of paragraph (*h*) of the definition "eligible individual" in section 122.6 of the Act, the following factors are to be considered in determining what constitutes care and upbringing of a qualified dependant:
>
> > (*a*) the supervision of the daily activities and needs of the qualified dependant;
> >
> > (*b*) the maintenance of a secure environment in which the qualified dependant resides;
> >
> > (*c*) the arrangement of, and transportation to, medical care at regular intervals and as required for the qualified dependant;
> >
> > (*d*) the arrangement of, participation in, and transportation to, educational, recreational, athletic or similar activities in respect of the qualified dependant;
> >
> > (*e*) the attendance to the needs of the qualified dependant when the qualified dependant is ill or otherwise in need of the attendance of another person;
> >
> > (*f*) the attendance to the hygienic needs of the qualified dependant on a regular basis;

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[9] [2006] 5 C.T.C. 2372.

[10] 2010 TCC 308.

[11] Where residency was found but the Appellant did not meet his burden of establishing the primary caregiver requirement.

> (*g*) the provision, generally, of guidance and companionship to the qualified dependant; and
>
> (*h*) the existence of a court order in respect of the qualified dependant that is valid in the jurisdiction in which the qualified dependant resides.

[18] It is clear from the case law dealing with Regulation 6302 that not every one of these factors will be applicable in every case. For example, if the children are no longer of an age to require the parent to see to their hygienic needs, paragraph (*f*) will not apply; if the child was never sick during the relevant period, paragraph (*e*) may have no application.

[19] In the present case, Mr. Ghaddar's illegal conduct has rendered inapplicable all but paragraphs (*h*) and, to some extent, (*b*) of the above factors. In respect of paragraph (*h*), the Appellant obtained three valid court orders during the Period: two pronouncing the children to be in her custody and resident with her in Quebec and a third condemning Mr. Ghaddar for his failure to respect such orders. These orders were based on the Court's findings of fact as to the state of affairs that existed throughout the Period. As for (*b*), her efforts to return the children safely to Canada through all legal means available are not inconsistent with "the maintenance of a secure environment" for the children in that place of residence.

[20] In the unique circumstances of this appeal and recognizing that this decision is without precedential value, I am satisfied that the children were resident with the Appellant and that she was the parent who primarily fulfilled the responsibility for the care and upbringing of the children during the Period.

[21] For the above reasons, the appeal is allowed and the Minister's reassessment is vacated.

Signed at Ottawa, Canada, this 6th day of August 2010.

"G.A. Sheridan"

Sheridan J.

CITATION:	2010TCC417
COURT FILE NO.:	2009-2603(IT)I
STYLE OF CAUSE:	FATME CHARAFEDDINE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	June 23, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	August 6, 2010

APPEARANCES:

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Counsel for the Respondent:	Me Marie-Claude Landry
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