IAFL Annual Meeting, USA and Canadian Chapters
- Meeting Santiago, Chile, 6-10 September 2023 -

Case Law Summaries: the Intersection between the Hague Abduction Convention and Asylum/Refugee Immigration Determinations

Prepared by Michael Stangarone, Ashley Goins,
Natalie Olowska-Szajka and Melissa Kucinski[1]

DATED: JULY 18, 2023

[1] Thank you to Tiffany Guo for her assistance with this case summary.

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M.A.A. v. D.E.M.E., 2020 ONCA 486 (CANADA)

Facts:

- Parties are appellant/mother, respondent/father and the OCL and 4 Interveners.
- Parents are both Jordanian citizens, married in Kuwait and lived there with 3 children. Both parents worked.
- Incident occurred where mother alleged she was attacked by the father in front of the children, which was a part of a pattern of ongoing personal and sexual violence. Police were called and advised parties not to bring charges.
- Parties separated and commenced court proceedings in Kuwait. Mother and children stayed in family home and father had weekly and holiday access. This continued for 2 months.
- 2 months later, mother brought children from Kuwait to Canada without father's consent. She sought refugee status in Canada, claiming that she fled abusive relationship.
- Father commenced application in Ontario under CLRA seeking return of children to Kuwait. Father denies abuse allegations and reported that mother wrongfully kidnapped the children.
- Mother filed a cross-application and asked Ontario to exercise jurisdiction to decide her custody claim, based on s. 23 of the CLRA. Mother alleged that father had been violent towards her and the children and they were afraid of him. Mother referred to a legal system in Kuwait that could not protect her or the children in a meaningful way. She filed an affidavit from a legal expert on Sharia law and statutory law in Kuwait.

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- Application judge appointed the OCL and requested a VOCR for the oldest boy, who described father's abuse and threats. OCL interviewed the two oldest children who both described events of abuse that they witnessed.
- Father denied abuse allegations and called on witnesses including the children's nanny and children's doctor. Claimed mother only returned to Canada to be with her family.

Decision of Application Judge:

- Judge did not wait for outcome of mother's refugee proceedings.
- Application judge found that Ontario didn't have jurisdiction under s. 23 of CLRA because there was no risk of serious harm to the children and ordered for return of children to Kuwait under s. 40.
- Judge concluded that the mother did not establish serious harm through her evidence and did not accept mother's allegations of abuse.

Appeal positions of parties:

- On appeal, mother argued that application judge erred in her credibility analysis of the mother, which tainted her consideration of the children's evidence. Ultimately judge erred in her determination of "serious harm", or, in the alternative, the application should have been adjourned pending a determination of refugee status. By ordering their return to Kuwait, judge undermined their rights to have refugee status determined.
- Mother's appeal was supported by the OCL and 4 interveners. At the time of appeal, children were age 4, 7 and 11.
- OCL argued that the judge should have been compelled to accept uncontroverted expert and social work evidence that the children face risk of serious emotional, psychological and physical harm if returned to Kuwait. Also

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argued that entire matter should have been adjourned pending determination of refugee status.

- Father argued that judge's findings re credibility are entitled to deference, and that there would have been error to adjourn the matter because it would cause even more significant delay.

Fresh Evidence on Appeal:

- Mother had been convicted in Kuwait of kidnapping the children. Father had two court orders in Kuwait, granting him custody and an "obedience order" for the mother to obey her husband.
- Doctor met with the children again and determined that oldest child had heightened anxiety, insomnia, nightmares, etc. and did not see a scenario where he could be safe with his father in Kuwait.
- OCL also tendered new evidence in the form of a clinical panel member's affidavit detailing child's negative reaction to the court's decision.

Issues:

1. The serious harm analysis under s. 23 of CLRA
2. Effect of the refugee claim on the application

Analysis on Appeal:

- Mother was successful on appeal.
- Serious harm analysis
    - Application judge erred in her treatment of the children's evidence provided through the OCL (uncontradicted evidence from 3 separate OCL experts) which established a risk of serious harm. No explanation of why expert evidence should be rejected which was an error.
    - Right of children to participate in matters involving them is fundamental to family law proceedings. Must incorporate children's view.

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- Therefore Ontario has jurisdiction under s. 23 CLRA.

- Refugee claim
  - Principle of non-refoulement is the cornerstone of international refugee protection, which is implemented in s. 115(1) of the Immigration and Refugee Protection Act. This principle applies to recognized refugees and asylum seekers whose status has not yet been determined.
  - If under the CLRA, a child is ordered returned to a place from which asylum is sought, the child's rights to asylum are lost.
  - Specifically, it is the return order under s. 40 of the CLRA that engages the non-refoulement principles, and NOT the s. 23 analysis. Ontario court should wait for a determination of refugee status to order children returned under s. 40. However, if court is satisfied as to serious harm, it may exercise jurisdiction under s. 23 and proceed to make custody/access orders even before refugee determination.
  - Application judge also erred in ordering the return of the children to Kuwait in the face of their asylum claim.

Holding:

- Mother's appeal allowed, custody and access hearing ordered to proceed in the SCJ

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G. v. G. UKSC 2020/0191 (ENGLAND)

This is a Supreme Court appeal about the interplay between two statutes:

1. 1980 Hague Convention – enables prompt return of wrongfully abducted child
2. 1951 Geneva Convention – protects those entitled to asylum from being returned to the country they are seeking refuge

Facts:

- G is an only child of divorced parents
- Until February 2020, her parents lived near to each other in South Africa. After telling her friends that she was a lesbian, G's mother began to experience persecution from her family in South Africa.
- As a result, she fled to England with G and made a *Geneva Convention* application for asylum on basis of fear of persecution from her family. On her asylum application, mother listed G as a dependent. Therefore, G had not made an application for asylum in her own right.
- Upon discovering that G had been taken to England, G's father made a *Hague* application for her return.
- Mother opposed Hague application, claims that G is entitled to protection under 1951 Geneva Convention which prevents a return order being made under the Hague convention until determination of the asylum application.

High Court Decision:

- At first instance, judge held that the father's application for return order should be stayed pending the determination of G's mother's asylum claim.
- High court judge had been misinformed that G had made her own asylum application.

COA Decision:

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- COA considered that there was no separate application by G to claim asylum, but rather, G was listed as a dependent on her mother's asylum application.
- Under the circumstances, the COA lifted the stay on the father's Hague application for a return order.
- COA considered that, in the circumstances, the High Court was not barred from determining the father's application for a return order, nor was it barred from making such an order.
- COA held that if G made her own separate application for asylum, then, a return order could still be made under the Hague convention, but it could not be implemented until the determination of asylum.
- COA Also gave detailed guidance as to the discretion to stay Hague proceedings where a child or taking parent had applied for or been granted refugee status. Generally, high court should be slow to staying a Hague application pending the determination of any asylum application.

Appeal to Supreme Court:

- Mother appeals to the Supreme Court on 3 grounds:
    1. 1. Her asylum application could also be understood as a separate application by G so that a return order should not be implemented until asylum was determined
    2. High court should not make a return order where there is pending asylum claim
    3. Guidance as to the high court being slow to stay an asylum application was incorrect
- Unanimously allowed appeal on ground 1, unanimously dismissed appeal on grounds 2 and 3

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- Reasons for allowing appeal on ground 1:
    - Asylum application which lists the child as dependent is also an asylum claim by that child if objectively can be understood as such. Adults' ground for fearing persecution are likely to apply to that child.
    - Admission by child to make application in their own right cannot be determinative.
    - Return order under Hague convention cannot be implemented until asylum application has been determined, if that application can be objectively understood as an application on behalf of G.
    - An asylum claim is not determined until conclusion of any appeal so that a return order cannot be implemented in Hague proceedings in respect of child with an in-country appeal. In other words, a pending in-country appeal bars the implementation of a return order. Because of the time taken by the in-country appeal process, this is likely to have a devastating impact on Hague proceedings. So, urgent consideration should be given to a legislative solution.
- Reasons in relation to grounds 2 and 3:
    - These two conventions (Hague and Geneva) must operate hand in hand in accordance with obligations of expedition and priority imposed for the benefit of children under the *Hague Convention*.
    - This means that as a general proposition, the high court should be slow to stay Hague proceedings and there is no reason why return order cannot be *made*, as opposed to implemented.
- Mother's appeal allowed in part and case is remitted to High Court for determination of the Hague proceedings.

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Salame Ajami v. Tescari Solano 2022 US Court of Appeals for the 6th Circuit (UNITED STATES)

Facts:

- Parties are Venezuelan citizens and have two children.
- In 2018, Mother removed the children from their home in Venezuela and brought them with her to the US.
- In February 2019, Father filed a Hague application seeking the children's return.
- In June 2019, mother and children were granted asylum in the US.

District Court:

- Established father's prima facie case of wrongful removal. The only issue before the court was whether mother had established an affirmative defence under article 13(b) of the *Hague Convention.*
- Under the *Hague Convention*, custody decisions are left to the country of children's habitual residence, unless grave risk of harm is established.
- Mother was found to have failed to establish her affirmative defense that returning the children to Venezuela would subject them to grave risk of harm. Children's return was ordered.

Court of Appeal:

- Affirmed the district court's decision.
- Mother argued that the threshold of grave risk of harm was met because the father was abusive, Venezuela (i.e. the children's habitual residence) was a zone of war and famine, and that Venezuelan courts were unable to adjudicate the dispute. Also argued that the district court should have considered the grant of asylum to the children.
- Reasons:

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- COA examined the evidence concerning abuse and agreed with lower court that the mother did not meet her burden on this point.
- COA considered conditions in Venezuela and held that the party asserting this defence must show more than that it's merely a country where money is in short supply. Overall concluded that the father could provide children with food, shelter and medication. Found that conditions were not deemed to be comparable to a zone of war, famine or disease.
- COA found that mother did not properly substantiate her claim that Venezuelan courts can't properly adjudicate the issues.

- Finally, COA dismissed mother's argument that the judicial branch should have deferred to the judgement of the executive branch which had granted the children asylum in the US. COA held that the district court had authority to act, despite the prior grant of asylum.
- Case from 5th circuit was cited, which held that the grant of asylum does NOT need to be revoked before children could be returned to home country pursuant to a return order. The asylum grant does not supersede the enforceability of a district court's order that the children should be returned home, as that order does not affect the responsibilities of either the Attorney General or Secretary of Homeland Security.
- Court recognized that the factors relevant to an asylum grant may also be relevant to whether the Hague Convention exceptions to return should apply. But the asylum finding that children have a well-founded fear of persecution does not substitute for or control a finding under article 13(b) of the Hague Convention about whether return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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- An asylum grant does not remove from the district court the authority to make controlling findings on the potential harm to the child. Grant of asylum does not substitute for the district court's determination that the mother failed to establish an article 13(b) affirmative defense based on grave risk of harm or intolerable situation.

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Gaudin v. Remis 2005 US 9th Circuit (UNITED STATES)

Facts:

- Parties had two children. In 2000, the children were living with the mother in Canada. The father was concerned about the way the mother was raising the children so he took them to Hawaii, refused to return them, and filed for custody in Hawaii family court.
- In July 2000, Hawaii family court gave the father temporary custody of the children.
- Mother then filed application under the ICARA and the Hague Convention seeking the return of the children to Canada. Father did not deny that he removed the children; he argued the defence under article 13 – that the children should not be returned because there was a grave risk of harm if returned to the mother in Canada.
- Father's evidence included a declaration and letter from a clinical psychologist who examined the children, stating that returning the children would result in significant damage to their mental health. Father also submitted a report of a guardian ad litem, appointed by the Hawaiian family court.
- Mother relied upon her own affidavit and letters from a neighbour and her pastor stating that she cared for the children. Mother alleged that the father had a drug problem and inappropriately sleeps with the children while nude.

Issue:

- Whether two children, abducted by father and brought to US, should be returned to Canada under the International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction

District Court:

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- Agreed with the mother that the father had wrongfully taken the children, but credited the father's evidence and concluded that the children would suffer a grave risk of psychological harm if returned to their mother.

Appeal – issue of mootness:

- Mother appealed. While that appeal was pending, the Hawaii family court awarded permanent custody of the children to the father and also concluded that the children would face a grave risk of psychological harm if returned.
- On October 12, 2001, father moved to dismiss the mother's appeal for mootness. He argued that the mother had moved permanently to Hawaii, purchased a home there, got a Hawaiian real estate broker's license and married her lawyer in this case. Neither the ICARA nor the Hague Convention could apply since both parties and children were permanently located in Hawaii.
- Court held that the ICARA and the Hague Convention cannot be invoked when the petitioner moves permanently to the same country in which the abductor and the children are located. However, it was established that domicile is the appropriate measure of whether one has moved permanently to a new jurisdiction, and the mother's temporary immigration status prevented her from establishing domicile in the US. Therefore the case is not moot.

Appeal – merits of the district court's decision of December 2000:

- First, the father moved to dismiss the appeal again under res judicata. This motion was denied.
- The court then considered the merits of the district court's refusal to order the children's return, which turned on the issue of the affirmative defense: whether the children would suffer a grave risk of physical or psychological harm of returned.
- Mother argued that the district court erred in finding that the children would face a grave risk of harm if returned. In the alternative, she argued that even if

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such risk existed, the district court erred in failing to consider alternative remedies by means of which the children could be transferred back to Canada without risking psychological harm.

- Court emphasized that the exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest. Rather, the question is whether the child would suffer “serious abuse” that is a great deal more than minimal.
- Courts applying ICARA have consistently held that before denying the return of a child because of a grave risk of harm, a court must consider alternative remedies that would allow both the return of the children to their home country and their protection from harm.
- While the district court recognized the need to consider alternative remedies, it mistakenly assumed that it had wide-ranging discretion to consider what remedy would be suitable under the totality of the circumstances. District court’s discretion was influenced by the existence/outcome of custody proceedings in Hawaii. This was an error.
- The basic purpose and function of the Hague Convention and ICARA are based on the principle that the home country should make the custody determination whenever possible.
- The question is simply whether any reasonable remedy can be forged that will permit the children to be returned to their home jurisdiction for a custody determination while avoiding the grave risk of harm that would result from living with their mother.
- A court may properly refuse to order the return of the children even absent a grave-risk finding if it finds that the children object to being returned and have

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attained an age and degree of maturity at which it is appropriate to take account of their views.

Holding:

- Appeal allowed, district court's judgment vacated, and case is remanded for further proceedings.

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A.M.R.I. v. K.E.R., 2011 ONCA 417 (CANADA)

Facts:

- Mother had custody of child in Mexico and father had access rights. In December 2008, 12-yo child travelled to Canada to visit her father and aunt. Child informed father and aunt that her mother in Mexico was physically and emotionally abusing her.
- In May 2010, child was found to be a refugee by Immigration and Refugee Board of Canada, Refugee Protection Division by reason of abuse by mother. The father was denied refugee status in Canada and moved to Norway, leaving the child in the care of her aunt in Canada.
- After child had been living in Toronto with her aunt and aunt's spouse for about 18 months, the mother brought a Hague application in Ontario for an order for the return of the child to Mexico.
- Only the father was named as a respondent on the mother's Hague application. The aunt moved for an order adding her as parties and appointing counsel for the child, or an amicus curiae, in the Hague application. Motion was denied.
- In September 2010, application judge held that child was being wrongfully retained in Ontario and granted order for her return to Mexico. At that point child was 14yo.
- One month later, child was removed from school in Toronto with police assistance, placed in mother's care and flown to Mexico despite child's protests, without notice to father or aunts. Child was told she was not allowed to communicate with anyone, including her aunts who she lived with for 21 months.
- Child informed police that she was a Convention refugee but she was denied permission to return home to retrieve her refugee papers.

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- Father appealed the Hague application judge's decision and brought fresh evidence, including fresh evidence from the OCL. OCL was appointed as counsel for the child on appeal.

Appeal Decision:

- Appeal allowed – child received no notice of Hague application or of return date for hearing. Her views and preferences were not sought or obtained at the hearing, nor, despite aunt's efforts, was she represented by counsel at hearing. In these circumstances, child was denied procedural fairness and her rights under s.7 of the Charter. Additionally, a finding of refugee status accorded by the IRB to a child affected by a Hague application gives rise to a rebuttable presumption that the removal of the child from Canada will expose the child to a risk of persecution, or a risk of harm.

Issues and Reasons on Appeal:

- Whether application judge erred in ordering the child's return to Mexico.

1. Does s. 46 of the CLRA conflict with s. 115 of the IRPA such that it is rendered inoperable under the constitutional doctrine of federal paramountcy?
    a. Answer: NO. A finding of refugee status accorded by the IRB to a child affected by a Hague application gives rise to a rebuttable presumption that the removal of the child from Canada will expose the child to a risk of persecution, or a risk of harm. In these circumstances, Canda's non-refoulement obligations and the import of a child's refugee status must be considered under the article 13(b) (grave risk of harm) and article 20 (fundamental freedoms) exceptions to mandatory return under the Hague Convention.
2. Did the application judge err in ordering the child's return to Mexico by

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a. Failing to consider the child's Convention refugee status, including her right under s. 115 of the IRPA to be protected from removal from Canada? YES, judge erred
    i. Application judge was aware of IRB granting refugee status to child, but no real weight was given to child's entitlement to protection from refoulement.
b. Failing to consider the exceptions to mandatory return set out under the Hague Convention? YES, judge erred
    i. Grave risk of harm and fundamental freedoms exception: On application for the return of a refugee child under the Hague Convention, the child's s.7 Charter rights also mandate that a risk assessment be performed regarding the existence and extent of any persisting risk of persecution to be faced by the child on return from Canada to another country.
    ii. Settlement in environment exception: after one year from the date of removal, the interests of a child in not having their life disrupted once he or she has settled down in a new environment may override the otherwise compelling need to protect all children from abduction.
    iii. Objection to return exception: if a child objects to the return and is an age and degree of maturity at which it is appropriate to take into account its views, then article 13 authorizes the refusal of an order of return. At 14yo, child was clearly of an age where views must be considered.
    iv. Acquiescence in wrongful retention exception: given the mother's delay in commencing her Hague application, this exception merited consideration by the application judge.

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c. Failing to ensure the child's participation at the hearing? YES, judge erred
    i. Where the proposed return engages a child's s.7 Charter rights, meaningful procedural protections must be afforded to the child. Including the right to 1) receive notice of the application, 2) receive adequate disclosure of the case for an order of return, 3) a reasonable opportunity to response to that case, 4) a reasonable opportunity to have his or her views on the merits of the application considered in accordance with child's age and legal of maturity, and 5) the right to representation.
    ii. In this case, the child received no notice of application or return date for hearing. Her views and preferences were not sought or obtained. She had no representation. Her s. 7 Charter rights were infringed and she was denied procedural fairness.
d. Failing to otherwise conduct the hearing in accordance with the principles of fundamental justice and procedural fairness? YES, judge erred
    i. There should have been an oral hearing

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Kovacs v. Kovacs, 2002 CarswellOnt 1429 (CANADA)

Facts:

- Mother, who was separated from father, took their 3yo child with her from Hungary to Canada. Mother sought refugee status for herself and the child, alleging severe abuse at hands of father and that the state of Hungary was unwilling or unable to protect her and the child. Mother also faced persecution in Hungary as Roma.
- Father also commended a proceeding in Hungary for divorce and custody. He was granted custody of the child in June 2001.
- In July 2001, Father brought Hague application for immediate return of child to Hungary.
- Father misled court with respect to his previous criminal convictions in Hungary and outstanding warrants for his arrest.

Issue:

- At issue on application was whether order for child's immediate return to Hungary could be made while claim on child's behalf for refugee status pursuant to the federal Immigration Act of Canada was pending.

Reasons:

- Application judge, summarizing the procedural timelines at that time, noted that Hague applications in the Ontario SCJ can usually be completed in 3-4 months while the refugee determination process to the completion of a hearing usually takes about a year.
- Held that the Hague Convention was not impaired, qualified or rendered inoperative by the Immigration Act under the doctrine of paramountcy. Thus, an order under the Hague Convention for the immediate return of a child is not delayed pending a decision of refugee status.

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- Ultimately, court found that the mother's removal and retention of the child was wrongful. This finding was based primarily on the finding that allegations of abuse from the mother were not credible.
- Gaps existed in evidence tendered by mother concerning alleged abuse. Were it not for fresh evidence concerning conviction of father and his attempt to defraud court with filing of false documents and affidavits, order would have issued for child's return to Hungary for determination of custody on merits.
- To accede to the father's position, however, would mean that the child would be returned to the father who was a fugitive from justice. Child would, if returned to father's care, be in environment which would present risk of psychological harm.
- Ordering child's return to Hungary would place child in intolerable situation.

Other Notes:

- Ontario SCJ denied the father's application on the grave risk exception, in large part because the father was a wanted fugitive in Hungary. Despite the application being denied, this Hague application alerted the RPD to exclude the mother under Article 1F(b) for child abduction. Mother was ultimately denied refugee status on the grounds that her actions constituted child abduction, a serious non-political crime that excludes a claimant from refugee status under the Convention Relating to the Status of Refugees.
- Since 2005, a significant number of women have been denied refugee status in Canada, just like the mother in this case, on the grounds that, in fleeing domestic violence and other dangerous situations with their children, they were purportedly guilty of child abduction.

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