The interplay between international child abduction and children's asylum claims

By Michael Stangarone & Tiffany Guo[1]

In the past few years, the interplay between international child abduction and children's asylum claims has become an increasingly relevant issue. The primary purpose of the *Hague Convention on the Civil Aspects of International Child Abduction* ("Hague Convention") is to protect children against wrongful removal or retention by one parent against the will of the other parent. Parents can seek relief under the Hague Convention when the both the left-behind country and the taking-country are signatories. In international child abduction cases involving countries that are not signatories to the Hague Convention, parents can seek relief under provincial legislation, such as Ontario's *Children's Law Reform Act* ("CLRA"). International refugee law concerns the protection of individuals fleeing prosecution in their countries. In Canada, our domestic legislation is the *Immigration and Refugee Protection Act* ("IRPA").

These legal mechanisms inevitably intertwine in practice, often when a mother who allegedly suffers domestic violence flees her home country with the child and settles in another state by applying for refugee status for herself and on behalf of the child. While the child's refugee status is pending, or even after the child has been granted refugee status, the father seeks the return of the child under either the Hague Convention or other applicable domestic legislation. This paper discusses the developing case law on this issue, in both Hague Convention and non-Hague Convention cases in Canada and internationally.

i. Hague Convention Cases

In ***Kovacs v. Kovacs*****, 2002 CarswellOnt 1429 (S.C.J.),** Justice Ferrier of the Ontario Superior Court of Justice received an application by the father for an order returning the children to Hungary. The mother, who had wrongfully removed the children to Canada, filed a claim for refugee status for herself and on behalf of the children alleging that they would be subject to persecution if required to return to Hungary. Justice Ferrier held that an order for the return of a child under the Hague Convention can be made while there is a pending claim on the child's behalf for refugee status in Canada. The Hague Convention requires an application for the return of the child to be dealt with expeditiously, which objective has been incorporated into Ontario's

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CLRA and the *Family Law Rules* with respect to non-Convention wrongful removal/retention cases. The whole thrust of the Hague Convention is to have the child returned to her home state immediately unless the respondent can establish one of the defences available, based on risk of harm to the child. Rule 37.2(2) of the *Family Law Rules* provides that "dealing with an international child abduction case justly includes applying these rules with a view to providing the timeliest and most efficient disposition of the case that is consistent with the principles of natural justice and fairness to the parties and every child involved in the case". Justice Ferrier held that a refugee claim on behalf of the child cannot be allowed to defeat the major purpose of the Hague Convention. Justice Ferrier noted at paragraph 124:

> [124] If the position of the respondent and the MCI were accepted, the practical effect would be to nullify the Hague Convention. Ontario could become a haven for persons abducting their children and seeking to avoid the enforcement of foreign custody orders. By the time a case was returned back to the Superior Court of Justice from the federal tribunal (and the Federal Court) the child could have become settled in Canada, and a court could find, relying on Article 13(b), that an order for the return of the child should not be made because to do so would place the child in an intolerable situation.

In ***Toiber v. Toiber*, 2006 CanLII 9407 (ON CA)**, the Ontario Court of Appeal ("ONCA") heard the mother's appeal from an order for the children to be returned to Israel following the father's successful application pursuant to the Hague Convention. The mother launched a refugee claim after arriving in Canada for herself and the children, which refugee claims were still pending at the date of the father's Hague Convention hearing. On appeal, the ONCA followed Justice Ferrier's reasoning in *Kovacs*. The reasoning in both *Kovacs* and *Toiber* has also been followed in subsequent decisions, including in ***Aza v. Zagroudnitski*, 2014 ONCJ 293** and by other provincial courts to justify making return orders pursuant to the Hague Convention in the face of pending refugee claims, including the Court of King's Bench of Manitoba in ***Singh v. Kaur,* 2022 MBQB 46** and the Court of King's Bench of New Brunswick in ***G. v K.G. (N.),* 2019 NBQB 46**.

In *Singh*, Justice MacPhail was faced with competing claims for the return of a child to his habitual residence under the Hague Convention, and a claim by the child (and the mother) for Canadian refugee status under the IRPA. The parties were both born in India but were residing in Italy after they married. The parties had a son together who was eight years old at the time of the hearing. He was born in Italy, and had Italian citizenship. Unfortunately, the marriage was not a

happy one and, without the father's knowledge or consent, the mother left Italy with the son in September 2021, and took him to Winnipeg to stay with her cousin. When the father learned that the mother and son had left Italy, he commenced an application in Manitoba under the Hague Convention. At the start of the Hague Application hearing on January 27, 2022, the mother's lawyer requested an adjournment because the mother was planning to apply for refugee status. The matter was adjourned to mid-February 2022. When the matter returned to court, the mother had already applied for refugee protection for both herself and the child under the IRPA based on allegations of domestic violence against the father.

The mother argued that the father's Hague Convention Application should be stayed until the refugee claims were decided. However, she did not provide evidence about how long the refugee process would take, or a viable explanation for why she waited until February 4, 2022, to apply for refugee status (even though she had been in Canada since September 2021). Given the timing of the mother's refugee application, and her failure to explain why she waited until February 4, 2022, to file it, Justice MacPhail found that the "refugee applications appear to have largely been made to prolong or defeat the father's Hague Abduction Convention request for return." The mother was also not able to provide Justice MacPhail with any authority for the proposition that an application for refugee status should automatically stay a proceeding under the *Hague Convention*.

In ***I. (A.M.R.) v. R. (K.E.)*** **(2011), 2 R.F.L. (7th) 251 (Ont. C.A.)**, the ONCA also confirmed that even if a child has been granted refugee status, that *alone* does not prevent a court from ordering that child returned to his or her habitual residence under the Hague Convention. Rather, when a child has been given refugee status, "a rebuttable presumption arises that there is a risk of persecution on return of the child to his or her country of habitual residence" that would be relevant to the court's analysis under article 13(b) of the Hague Convention (the grave risk of harm exception).

Ultimately, after considering the relevant authorities, including *Kovacs* and *I. (A.M.R.)*, Justice MacPhail wholly rejected the mother's request to stay the father's Hague Convention Application pending a determination of the refugee claims:

> [62] **To allow a parent's refugee application for their child to stay Hague Abduction Convention applications for the return of wrongfully removed or retained children,**

> **would, to use an oft-referred to expression, "drive a coach and four" through the Convention** and gravely endanger achievement of those important objectives noted by the Supreme Court of Canada. It would significantly delay consideration of requests for return involving non-Canadian children. **Even if the parent's refugee application was unsuccessful, considerable time would pass before that determination was made. A haven would be created for parental child abductors.**

Her Honour was satisfied that the record before her, which unlike the mother's refugee Application included evidence from ***both*** parties, would allow her to fairly determine whether the child would be exposed to a grave risk of harm if he was returned to Italy:

> [59] **Unlike an Immigration and Refugee Board proceeding, I have comprehensive sworn or affirmed evidence before me from both parties**, including the mother's **refugee** applications, in addition to the sworn or affirmed evidence of other individuals from Italy. **This Court is best placed to consider the evidence of both parties in totality and determine whether there is a grave risk that an order for the child's return to Italy would, on the basis of the domestic violence allegations of the mother, "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" within the meaning of Article 13(b) of the Convention.** The hearing can also occur promptly, a key component of the meaningful and effective operation of the Convention and addressing the best interests of children. [emphasis added]

These same principles were considered by Justice Shaw in the recent case of ***Ceballos v. Casanova,*** 2024 ONSC 6865, involving Mexico. The parties and their son were all Mexican citizens; the parties separated in February 2021 and had lived separately ever since. In August 2023, the mother travelled with the son to a trip to Europe, with the father's consent. During that trip, she then travelled with the son to Canada without the father's knowledge and thereafter refused to return their son to Mexico. The father applied under the Hague Convention for their son to be returned home. He learned for the first time, through the mother's responding materials, that she had commenced a refugee claim for herself and their son in Canada. The mother conceded that the child was habitually resident in Mexico at the time of his wrongful removal and retention and that the father did not acquiesce to the child's move to Canada. The hearing therefore proceeded only on the issue of whether the defense under Article 13(b) of the Hague Convention applied. The mother argued that the child would face grave risk of harm or an intolerable situation if he returned to Mexico, as a result of the father's abusive conduct (which was denied by the father).

With respect to the Article 13(b) analysis, Justice Shaw considered the expert evidence of both parties and preferred that of the father's expert. Her Honour also found that Mexico was equipped to make any necessary orders to protect the mother and the child, and to determine the child's best interests. She ultimately found that the mother failed to discharge her onus to prove the high threshold that the child would face a grave risk of harm or be placed in an intolerable situation if he returned to Mexico.

With respect to the impact of the child's refugee claim, which was still pending, Justice Shaw considered the fact that the mother did not file any material in support of her and the child's refugee claims to the Immigration and Refugee Board until after the father had commenced his Hague Convention application and found that "this suggests there may have been a strategic basis to the refugee claim." Her Honour relied on the reasoning in *Kovacs*, *Singh*, and *I. (A.M.R.)* to conclude that the pending refugee claim did not prevent her from making a determination under the Hague Convention and did not automatically stay the Hague Convention proceeding. The child was ordered to be returned to Mexico, and the father was ordered to comply with protective undertakings.

However, in the Supreme Court of the United Kingdom ("UKSC", the highest court in the UK), this matter was decided differently in the case of ***G. v. G.*** **UKSC 2020/0191**. The parties in that case were divorced and had one child, residing in South Africa. The mother began experiencing persecution from her family after telling her friends that she was a lesbian. As a result, she fled with the child to the UK and made an asylum claim for herself under the *Geneva Convention,* listing the child as her dependant. The father then applied for the child's return to South Africa under the Hague Convention. The mother opposed, arguing that the child was entitled to protection under the *Geneva Convention* which prevents a return order being made under the Hague Convention until determination of the asylum application. In the court of first instance, the father's Hague Application was stayed pending the determination of the mother's asylum claim. The court of appeal then lifted the stay on the father's Hague Convention application and made a return order, reasoning that the child was only listed as a dependant on the mother's asylum application and did not make her own separate application for asylum. As such, the stay could not apply.

The UKSC then clarified that an asylum application which lists the child as a dependant is also an asylum claim by that child. The court also acknowledged that return orders under the Hague Convention cannot be implemented until the asylum application has been determined. Further, the UKSC clarified that an asylum claim is not "determined" until the conclusion of any appeal, meaning a return order cannot be implemented in Hague proceedings in respect of any child with an in-country asylum appeal still pending. Because of the time taken by the in-country appeal process, this can have a devastating impact on Hague proceedings. The UKSC urged urgent consideration to be given to a legislative solution. Ultimately, the case was remitted to the court of first instant for a determination of the Hague proceedings; a return order can be made but cannot be implemented until the asylum claim has been determined (inclusive of any appeal).

In the ***Salame Ajami v. Tescari Solano*, No. 20-5283 (6th Cir. 2022)**, the United States Court of Appeals for the 6th Circuit decided a father's Hague Application for the parties' two children to be returned to Venezuela, *after* the mother and the children were already granted asylum in the United States. The court of first instance ordered that the children be returned to Venezuela. The mother appealed on the basis that the threshold of grave risk of harm or intolerable situation under Article 13(b) was met because the father was abusive, and Venezuela was a zone of war and famine, and that Venezuelan courts were unable to adjudicate the parties' dispute. She also argued that the lower court should have considered the grant of asylum status to the children. The court of appeal ultimately affirmed the lower court's decision, finding that the mother did not meet her burden with respect to putting forward evidence of the alleged abuse, that the conditions in Venezuela were not comparable to a zone of war, famine or disease, and that the mother did not properly substantiate her claim that the Venezuelan courts could not properly adjudicate the issues.

Further, the court of appeal recognized that the factors relevant to an asylum grant may also be relevant to whether the Hague Convention exceptions to return should apply. However, the asylum finding that the 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 a return order would expose the children to physical or psychological harm or otherwise place the children in an intolerable situation. The court of appeal confirmed that an asylum grant does not remove from the lower court its authority to make controlling findings on the potential harm to the

children. A grant of asylum does not substitute for the lower court's determination that the mother failed to establish an Article 13(b) defence.

ii. Non-Hague Convention Cases

In Canada, parents whose children have been abducted from a non-Hague Convention signatory country can apply for their return pursuant the provincial legislation rather than the Hague Convention. Unless the abducting parent demonstrates that Ontario courts should make parenting orders on any one of the four bases outlined in CLRA subsections 22(1)(a) or (b) or 23, or *parens patriae* jurisdiction, the courts should decline to exercise jurisdiction with respect to a child.

In ***M.A.A. v. D.E.M.E.*****,** **2020 ONCA 486** **(**leave to appeal refused, 2021 CarswellOnt 2398 (S.C.C.)), the Court of Appeal for Ontario (ONCA) concluded that family courts cannot issue return orders for children under section 40 of the CLRA if their applications for refugee status in Canada are still pending. The appellate Court found that refugee protection is not just limited to those granted refugee status but applies equally to asylum seekers. Her Honour found that children are entitled to protection as they seek asylum, and that "a return order must not be made under s. 40(3) of the CLRA in the face of a child's pending refugee claim.

In the recent case of ***A.A. v. Z.M.*****,** **2024 ONCA 768**, the mother moved before a single judge, Justice Nordheimer, in the ONCA stay (pending appeal) an order for the return of the child to Bangladesh, a non-Hague Convention signatory. The case was about a Bangladeshi family who travelled on round-trip tickets to Canada for a three-week vacation on May 2, 2024. They travelled on visitor visas and were scheduled to return to Bangladesh on May 25, 2024. Once in Canada, the mother expressed her strong wish for the family to remain in Canada permanently by seeking asylum here. The father opposed; their home was in Bangladesh, he had secure employment and stable financial circumstances there. The parties discussed extending their trip in Canada by a week, but the mother then unilaterally filed a refugee application. The parties argued. The mother called the police. She made allegations against the father. The father was arrested. The father filed an urgent motion seeking that the child be returned to Bangladesh and for interim parenting time. He also started a proceeding in Bangladesh claiming the return of the child and custody. The mother sought several adjournments, and the motion was eventually made peremptory on her and heard on August 22, 2024. The father was successful; Justice Sharma, the motion judge, ordered that the child be returned to Bangladesh.

In her evidence, the mother acknowledged that the child was born in Bangladesh and had always lived there. She acknowledged that she had family in Bangladesh who provided her with support. The motion judge noted that the mother did not give any evidence that the child would suffer harm if she was returned to Bangladesh. The mother gave evidence that she started a refugee claim in Canada for her and the child but did not offer any information as to the factual foundation for the refugee claim. At the time of the motion before Justice Nordheimer, the mother and child were living in a shelter. The mother had no support in Canada and no source of income. Justice Sharma held that neither CLRA ss. 22(1)(a) nor (b) were in play. His Honour also concluded that s. 23 did not apply because there was no evidence that the child would suffer serious harm if returned to the father's care in Bangladesh. These findings were, to Justice Nordheimer, unassailable.

Therefore, the mother's stay motion focussed almost exclusively on the ONCA's earlier decision in *M.A.A.*. The mother's argument was that the motion judge erred in law by failing to consider *M.A.A.*, binding authority from the ONCA, which constituted a serious issue on appeal. She relied on *M.A.A.* to argue that, in the face of a child's unresolved refugee claim, no return order should ever be made pending the resolution of the refugee claim—even if the record showed no merit to the refugee claim. Justice Nordheimer was of the view that the mother's argument required far too literal an interpretation of those paragraphs:

> [13] That decision [*A. (M.A.)*] cannot be read separately from the factual foundation on which it was based. **In that case, there was evidence of serious harm to the mother and the children arising from an abusive relationship that caused them to leave their home country of Kuwait.** Indeed, there was evidence directly from one of the children (age 11) of the prospect of harm to him from his father if he was returned to Kuwait. **There was also evidence that the mother had taken the children from Kuwait, brought them to Canada, and immediately made an asylum claim.**
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> [14] This case is fundamentally different on its facts. The mother, father, and child came to Canada for a three-week holiday. There was no discussion of seeking asylum until some time after they arrived. In addition, it is unclear when the mother made her refugee claim. It was not made on May 2 when they arrived. In fact, it had not been made by July 4, when the matter was before Horkins J. because, in reference to the potential refugee claim, Horkins J. notes in her endorsement that "She has not commenced this process." [**emphasis** added]

Justice Nordheimer concluded that *M.A.A.* cannot stand for the "blanket proposition" that — whenever a refugee claim is made — the court must delay exercising its CLRA jurisdiction.

Were that the case, it would easy for a parent to delay the return of an abducted child to the jurisdiction of their habitual residence for months, if not years. As noted by Justice Nordheimer:

> [18] If the child in this case was required to stay in Canada while that process unfolds, she could well wind up spending more time in this foreign country than she has in her home country. If that were to occur, it would then add an additional level of complication as to the best interests of the child if a determination was subsequently made denying the refugee claim. The child would then be returned to her home country with less connection to it than to this country.

Here, according to Justice Nordheimer, the mother did not meet the test for a stay. While there was arguably a serious issue for appeal — the debate over the scope of the decision in *M.A.A.* — the mother could not show she would face irreparable harm without a stay. The alleged irreparable harm was that the mother and child would lose their refugee claim if they return to Bangladesh; but there was no requirement that the mother return to Bangladesh. Only the child was ordered to return. Therefore, the mother could have stayed in Canada and sought custody through the courts of Bangladesh if her refugee claim was ultimately successful. Furthermore, without "a scintilla of evidence" to support her refugee claim, irreparable harm could not arise; irreparable harm cannot arise from the loss of a proceeding without any apparent merit.

The mother then sought a panel review by three judges of the ONCA of Justice Nordheimer's dismissal of her request for a stay. In a 2-to-1 decision in ***A.A. v. Z.M.*****,** **2024 ONCA 923**, the majority granted the mother's motion and set aside Justice Nordheimer's decision.

On the issue of pending refugee claims and the interpretation of *M.A.A.*, Justices Madsen and Copeland, for the majority, held that *M.A.A.* gives clear direction about the relationship between ss. 23 and 40 of the CLRA in the context of a pending refugee application. Specifically, *M.A.A.* holds that even if the serious harm test under s. 23 is not met, where there is a pending refugee claim, a child should, nevertheless, not be returned under s. 40. The majority also noted that *M.A.A.* affirmed the principle of non-refoulement as the "cornerstone of international refugee protection", noting that if a child is returned to a place from which asylum is sought, the child's rights to asylum are lost. The scope of certain statements in *M.A.A.* and whether they require qualification was, in the majority's view, a serious issue on appeal. The majority found that there was *more* than a "scintilla" of evidence supporting the mother and child's refugee claims.

The majority held that the stay motion judge erred in principle in his consideration of irreparable harm to the mother and the child that would arise from the dismissal of the stay motion. First, the majority noted that the stay motion judge incorrectly held that irreparable harm cannot, "arise from a proceeding that has no apparent merit". The majority noted that it could not be fairly concluded at this stage that the refugee claims for the mother and the child had no apparent merit. The majority acknowledged that the mother gave oral evidence that she experienced ongoing domestic violence at the hands of the father, during which the child was at times present. Furthermore, the majority noted that there were outstanding serious criminal charges against the father which ought not to be ignored. If the mother and/or the child could not be protected from domestic violence in Bangladesh, this could form the basis for a refugee claim.

Second, the majority held that in the motion judge's analysis of irreparable harm, he focused solely on the mother, and did not consider irreparable harm to the child as is required. Where the order sought to be stayed involves the parenting of a child, the overriding consideration must be the best interests of the child. Lastly, the majority noted that in suggesting that the mother could simply stay in Ontario and pursue custody of the child, the stay motion judge did not advert to the fact that the child was still an infant who was nursing. The majority held that while primary care is not determinative, separating a child from their primary caregiver "should never be considered lightly". Here, the majority held that such separation was not considered at all.

The majority noted that the stay motion judge expressed concern about the potential impact on the child of anticipated delays in the refugee determination process, stating that "refugee claims can take months, in some cases years, to resolve." He surmised that by the time the process concluded, the child could "well wind up spending more time in this foreign country than she has in her home country", leading to a lessened connection with her native country of Bangladesh if the refugee claim was denied. The majority held that this was an error in principle to consider the length of time for refugee claims to resolve in the context of considering a stay pending appeal. The only relevant delay was the delay pending disposition of the appeal, a much shorter time period.

The majority held that the appeal had been expedited and was scheduled to be argued in one month. If the appeal was unsuccessful, there would still be a timely return of the child to

Bangladesh. Weighed against this relatively brief delay, the serious concerns outlined above favoured the granting of the stay pending disposition of the appeal.

Justice Hourigan wrote a strong dissenting opinion, noting that the majority did not take issue with the motion judge's finding that this matter constituted a serious issue. Their concern was about the weight the motion judge gave to the issue. Justice Hourigan noted that the majority believed the motion judge was obliged to assign some "super weight" to this branch of the test. The majority's analysis was contrary to established precedent and constituted a misuse of the attenuated powers available to a panel reviewing a single judge's decision.

On the issue of irreparable harm, Justice Hourigan noted that the loss of the child's refugee claim was made after the parties made two appearances on the respondent's motion for an order to return the child to Bangladesh and after the appellant had been ordered by two judges to file materials in support of her position. When the stay motion judge attempted to understand the nature of the claim and gauge whether it had any merit, he was told he was prohibited from knowing anything about the claim. According to counsel for the appellant, all that mattered was that this late-in-coming refugee claim had been asserted. That was sufficient to prevent a return of the child to her habitual residence. It mattered not even if the claim was made in bad faith or was frivolous. The motion judge correctly observed that there was no evidence before Justice Sharma or him that would provide a foundation to suggest that the appellant had a potentially meritorious refugee claim. Given the lack of evidence, the appellant did not discharge her onus of proving irreparable harm and the motion judge made no error in that regard.

Justice Hourigan noted that the primary criticism by the majority of the motion judge's balance of convenience analysis was his comment that the refugee claim could take months or years to complete. In his opinion, this criticism was unfounded and extraordinary. What the motion judge did – and what he was supposed to do – was take a step back and consider holistically the merits of the litigation to determine what the justice of the case required. The motion judge's conclusion on this issue was amply supported on the record. If the child stayed in Canada, she would continue to be cut off from her siblings and her father. The mother's unilateral conduct in reducing or eliminating the father's role in the child's life was inconsistent with the child's best interests. There would also be economic stability if she returned to Bangladesh. On the other hand, the primary benefit of staying in Canada with her mother in a shelter was that the child will

not lose her refugee claim. Justice Hourigan reiterated that nothing was known about that claim, and according to the appellant, the Court was prohibited from knowing about it.

The appeal of the *A.A. v. Z.M.* case was heard together with fresh evidence motions in January 2025. The decision remains under reserve at this time.