CITATION: A.M.R.I. v. K.E.R., 2011 ONCA 417
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COURT OF APPEAL FOR ONTARIO

Cronk, Gillese and MacFarland JJ.A.

BETWEEN

A.M.R.I.

Applicant (Respondent on Appeal)

and

K.E.R.

Respondent (Appellant on Appeal)

Jeffery Wilson and Chelsea Hooper, for the respondent (appellant on appeal)

Philip M. Epstein Q.C., Aaron Franks, Michael Zalev and Daniella Wald, for the applicant (respondent on appeal)

Lucy McSweeney, Katherine Kavassalis and Caterina Tempesta, for the Office of the Children's Lawyer

Urszula Kaczmarczyk and Jocelyn Espejo Clarke, for the Attorney General of Canada

Sean Hanley, for the Attorney General of Ontario

Angus Grant, for the intervener, Canadian Council for Refugees

Lorne Waldman, for the intervener, the United Nations High Commissioner for Refugees

Jacqueline Swaisland, for the intervener, the Canadian Civil Liberties Association

Heard: April 12 and 13, 2011

On appeal from the order of Justice George Czutrin of the Superior Court of Justice, dated September 21, 2010, granting an application under the *Convention on the Civil Aspects of International Child Abduction*, 1980.

BY THE COURT:

[1] This appeal raises for the first time in this court the important question of the rights of affected parties on an application under the Hague Convention[1] for the return of a child to her country of origin, when the child had been accepted in Canada as a Convention refugee by reason of abuse by her mother.

[2] This question raises significant international, human rights and family law issues, including the interplay between Canada's international obligations under the Hague Convention on the one hand and certain of the protective provisions of the Refugee Convention[2] on the other. That said, this case is ultimately about the rights of a refugee child to be heard and to participate in a Hague Convention application.

[3] In December 2008, a 12-year old girl travelled from Cancun, Mexico, to Toronto, Ontario, accompanied by her maternal grandmother and uncle, for a visit with her father and paternal aunt. The girl's mother, who lived in Cancun, had legal custody of the girl, while the father had access rights.[3] The mother consented to the access visit.

[4] During the visit, the grandmother and then the girl disclosed to the father and the aunt that the girl had been abused by her mother. The girl did not return to Mexico as arranged, instead remaining in Toronto with her father, her aunt and her aunt's same-sex

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[1] *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 1343 U.N.T.S. 89.
[2] *Convention Relating to the Status of Refugees*, 28 July 1951, 1989 U.N.T.S. 150.
[3] Both in the proceedings below and during oral argument before this court, these custody arrangements were acknowledged by the father.

spouse. In May 2010, the girl was found to be a refugee by the Immigration and Refugee Board of Canada, Refugee Protection Division (the "IRB") by reason of abuse by her mother. Shortly thereafter, the father was denied refugee status in Canada and moved to Norway.

[5] After the girl had been living in Toronto with her aunt and her aunt's spouse for about 18 months, the mother brought a Hague Convention application in Ontario for an order compelling the girl's return to Mexico. The father and the paternal aunt were served with the application, although the father was the only named respondent. The aunts, who had commenced a custody application, moved for an order adding them as parties and appointing counsel for the girl or an *amicus curiae* in the Hague Convention application. Their motion was denied.

[6] Prior to the expiry of the permitted time for the father's response to the Hague Convention application, and without notice to the aunts or the girl, the mother arranged for a hearing date. The father claims that he did not receive timely notice of the hearing date. The hearing eventually proceeded on an uncontested basis, with none of the father, the aunts or the girl participating.

[7] On September 21, 2010, the application judge held that the girl was being wrongfully retained in Ontario and granted an order for her summary and immediate return to Mexico. The girl was then almost 14 years of age. About one month later, she was removed from her school in Toronto with the assistance of the police, placed in the

care of her mother, and flown to Mexico despite her protests and without notice to the father or the aunts. Although she informed the police and others present that she was a Convention refugee, the girl was denied permission to return home to retrieve her refugee papers. She was not allowed to communicate with anyone in any way. This included her aunts, with whom she had been residing for the prior 21 months. Apart entirely from the legality of the girl's removal, the manner in which it was effected offended the girl's right to dignity and respect. It also had the potential to undermine public confidence in the administration of justice. We take note of the evidence of the concerns and outrage of the girl's school principal and of her fellow students at the circumstances surrounding her removal.

[8] The father appealed the Hague application judge's decision to this court. Because of the public importance of the issues, several organizations were given permission to participate in the appeal, as parties or interveners. Their participation, along with that of counsel for the principal parties, greatly assisted the court.

[9] Given the need for an urgent resolution of the appeal and the difficult legal issues raised, this court released its decision with brief reasons on April 18, 2011, with full reasons to follow. In that decision, the court allowed the appeal, set aside the order of return and directed that a new Hague Convention hearing be held. The court also directed the parties to do everything within their power to co-operate and facilitate the

child's return to Ontario to participate in the new hearing. These are the full reasons for the court's decision.

I. Facts and Proceedings

[10] The principal parties are sharply divided on many of the relevant background facts. Several parties, including the Office of the Children's Lawyer (the "OCL"), filed extensive fresh evidence on appeal. This consisted of affidavit evidence from numerous deponents, much of which is conflicting. With the exception of one contested affidavit, the fresh evidence was essentially admitted on consent. Based on the record as augmented by the fresh evidence, the following facts are pertinent to this appeal.

(1) Principal Parties and Triggering Events

[11] The appellant, K.E.R. (the "father"),[4] and the respondent, A.M.R.I. (the mother"), married, separated and divorced in Mexico, where they both lived until the father moved to Canada in 2006. There is one child of the marriage, J.R.I. (the "child"), who was born in Mexico on December 31, 1996. In July 2000, the father and the mother entered into a separation agreement, which was subsequently incorporated into a final consent divorce decree issued by the Family Court of Cancun on January 11, 2001. The parties accept that, under the agreement and divorce decree, the mother was granted legal custody of the child. The father was granted access rights and obliged to pay monthly child support.

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[4] After the release of this court's decision on April 18, 2011, the girl was declared to be a child in need of protection under the *Child and Family Services Act*, R.S.O. 1990, c. 11. In light of the mandatory terms of s. 45(8) of that Act, these reasons exclude any information that might have the effect of identifying the child or her family members.

[12] Following separation, the father visited the child infrequently, was not involved in decision-making for her and, according to the mother's evidence, honoured his child support obligations only until sometime in 2002. In 2006, he moved to Mexico City and then to Canada. Throughout, the child continued to live in Cancun with her mother and, later, with her mother, her step-father, and her young step-sister.

[13] In December 2008, the mother agreed to allow the child to travel to Toronto to visit her father, her paternal aunt (the "aunt"), and her spouse (collectively, the "aunts"). The child arrived in Toronto on December 24, 2008, accompanied by her maternal grandmother (the "grandmother"), and one of her maternal uncles. Return airline tickets to Cancun had been arranged for the trio, for January 11, 2009.

[14] During the visit, the grandmother told the father and the aunts that the child had been abused by the mother and had problems with her step-father. The child later disclosed that she was the victim of regular physical and emotional abuse by her mother.

[15] On January 11, 2009, the child's grandmother and uncle returned alone to Cancun, leaving the child in Toronto with her father and the aunts, without the mother's consent. The mother claims that the father initially assured her that the child's departure was merely delayed due to a scheduled dental appointment and later offered various excuses for the continuing delay in arranging for the child to return to Mexico. The mother alleges that she had difficulty reaching the child directly and that, after February 2009, she was out of contact with her for approximately three months.

[16] The mother contacted the Mexican Central Authority under the Hague Convention in January 2009 to obtain information on initiating an application for the child's return to Mexico. She claims that the commencement of her application was delayed due to administrative irregularities concerning the formal registration of her divorce decree.

[17] The mother's Hague Convention application (the "Hague application") was not issued through the Central Authority in Ontario until mid-July 2010.

(2) Refugee Protection Application

[18] Early in 2009, the child commenced an application under ss. 96 and 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"), for refugee protection on the basis of alleged abuse by her mother. A hearing proceeded before the IRB on January 26 and April 21, 2010. The child was represented by counsel, as well as a Designated Representative appointed by the IRB to act on her behalf. As is customary at such hearings, the mother received no notice of, and did not participate in, the IRB hearing.

[19] The child and the father both testified before the IRB. The child recounted various instances of physical and emotional abuse by her mother. She said that her mother hit her "at least once daily", sometimes with a broom, a towel, a "magic rag", shoes or a plate, which often left bruises on her body. She also described incidents of psychological abuse by her mother.

[20] A psychological assessment report prepared by Dr. Ana Bodnar, dated January 20, 2010, was also filed with the IRB. In her report, Dr. Bodnar described the child's abuse claims in detail, noted the child's desire to stay in Canada, and offered the opinion that the child's reported symptoms aligned with post-traumatic stress disorder.

[21] On May 5, 2010, the IRB determined that the child was a Convention refugee by reason of abuse by her mother. In its reasons dated April 27, 2010, the IRB held that the child had rebutted the presumption that Mexico could provide her with sufficient protection and, on removal, the child "would be forced to return to her abuser".

[22] Shortly thereafter, once his own application for refugee status in Canada was denied, the father moved to Norway, where he now resides with his current wife and their young child.

(3) Hague Proceeding

[23] On July 16, 2010, the mother issued her Hague application in Ontario, requesting a declaration that the child was being wrongfully retained in Ontario by the father and an order requiring her immediate return to Cancun.

[24] The father was the only named respondent to the Hague application and, by then, was residing in Norway. After several attempts to find and serve him with the application, personal service on the aunt was effected on July 28, 2010. Service on the father was eventually validated by court order, effective July 28, 2010. The child was not

made a party to the application, and no notice of the application was served on her, her counsel or her Designated Representative in the IRB proceeding.

(4) Aunts' Proceedings

[25] Under rule 10(2) of the *Family Law Rules*, O. Reg. 114/99, the father had 60 days within which to respond to the Hague application. At no point did he take any steps to do so.[5] However, on July 26, 2010, the aunts commenced an application in the Ontario Court of Justice for their joint custody of the child. The child's parents were named as respondents. Two days later, after the aunt was served with the Hague application, the aunts moved for an order adding them as parties to the Hague application under rule 7(5) of the *Family Law Rules*, consolidating the Hague and custody applications, and appointing counsel to represent the child on the Hague application pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C. 43[6] (the "Procedural Motion"). The father took no part in the Procedural Motion and the mother opposed it.

[26] By order dated September 2, 2010, Klowak J. of the Superior Court of Justice (the "motion judge") dismissed the Procedural Motion in its entirety. She concluded that, even if the Aunts could be added as parties to the Hague application under the *Rules*, "there [was] no pressing need to do so" and it would "just encumber and delay what the signatory countries have agreed is to be a speedy process" under the Hague Convention.

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[5] There is some evidence before this court suggesting that, based on legal advice, the father understood that no family court proceeding could undo the child's status as a Convention refugee.

[6] Section 89(3.1) of the *Courts of Justice Act* authorizes the court to request that the OCL act as the legal representative of a minor or other person who is not a party to a proceeding.

[27] The motion judge also declined to appoint the OCL as counsel for the child or to appoint an *amicus curiae* to assist the court. She reasoned in part that, while the child "should have a voice", evidence of her wishes and of her abuse claims was already available to the court through the IRB decision and Dr. Bodnar's report. As a result, no useful purpose would be served by involving counsel "to see if [the child] now has something further to add". For similar reasons, she held that the aunts' proposed additional evidence of the risk of harm to the child in Mexico was speculative. The motion judge directed that the materials before the IRB and those presented by the aunts in support of the Procedural Motion be placed before the Hague application judge.

[28] No appeal was taken by the aunts from the motion judge's ruling. Nor did anyone move to set aside the motion judge's order, or otherwise contact the mother's counsel on the child's behalf. As a result of the motion judge's order and the pending Hague application, the aunts' custody application was pre-empted.

[29] The motion judge's refusal to add the aunts as parties or to appoint counsel for the child created serious difficulties at the hearing of the Hague application and virtually unremediable deficiencies in the evidence, as we discuss more fully below.

(5) Hague Hearing

[30] On August 13, 2010, the mother's solicitors filed a notice of motion in the Superior Court for an August 31, 2010 hearing of the Hague application (the "Hearing"). When the Hearing did not proceed on that date, they filed a second notice of motion,

seeking a return date of September 21, 2010. For reasons that are unclear on the record before us, both motions sought a return date before the expiry of the 60 days permitted for the father's response to the Hague application.

[31] The mother's second notice of motion was served on the father by express mail in accordance with the court's earlier order validating service. The father asserts that he did not receive the notice of return of motion in Norway until after the Hearing. Moreover, neither motion was served on the aunts or their counsel on the Procedural Motion, nor was the child served with the motions, despite the fact that, before the IRB, she was represented by counsel and had a Designated Representative of record. As a result, none of the father, the aunts or the child attended the Hearing and the Hearing proceeded, in effect, *ex parte*.

[32] The record before the Hague application judge (the "application judge") included an affidavit sworn by the mother, in which she alleged that the child's claims of abuse were "completely false" and fabricated by the aunts in order to "manipulate the immigration system to keep [the child] in Canada". The record also included affidavit evidence filed by the aunt in support of the Procedural Motion, in which she outlined the child's depiction of abuse, and described what she termed a "grave risk of harm" to the child, the child's "objections to returning to Mexico", and the child's circumstances in Canada. Copies of the IRB's Notice of Decision and reasons, together with Dr. Bodnar's psychological assessment report, were attached to the aunt's affidavit.

[33] In an affidavit sworn on November 29, 2009, which was before the IRB but not before the application judge, the grandmother had detailed abuse by the mother against the child. On July 29, 2010, the grandmother swore another affidavit in Mexico, in which she made no claims of abuse by the mother. This affidavit was before the application judge. On appeal, the father submits as fresh evidence a further affidavit sworn by the grandmother on January 17, 2011, in which she claims that her July 29, 2010 affidavit was untruthful and was sworn under intimidation.

[34] No formal reasons for decision were released by the application judge. Fortunately, a brief Hearing transcript (17 pages) and a copy of the materials filed with the application judge are available and were reviewed by this court.

[35] At the Hearing, the mother's counsel told the application judge: (1) the application was unopposed, as the only respondent – the father – was in Norway; (2) counsel in attendance at the Hearing was retained by the "Central Authority"; (3) a court order in Mexico had granted the mother the equivalent of sole custody of the child and full access rights to the father; (4) the child had been in Canada since December 2008 and did not want to go back to Mexico, as she claimed to be the victim of "almost constant daily abuse" at the hands of her mother; (5) the child's IRPA application may have been "manipulated" by the father out of his desire to obtain entry to Canada with the child's future sponsorship assistance; (6) the nature of the relief sought and denied on the Procedural Motion; (7) the mother had obtained the necessary travel documents to come

to Canada to return the child to Mexico; and (8) counsel would accompany the mother to pick up the child.

[36] Some of this information was incorrect or unsupported by the evidence. For example, counsel had been retained by the mother, not by the Central Authority. Furthermore, there was no evidence to support counsel's suggestion that the child's refugee claim may have been "manipulated" by the father for his own self-interested immigration purposes, an allegation that he vigorously denies, or the mother's allegation that the aunts had "manipulate[d] the immigration system to keep [the child] in Canada".

[37] The application judge recognized that both the Hague and Refugee Conventions were engaged on the application. He questioned counsel as to whether current information about the child should be obtained. In response, counsel submitted that, on the basis of the material from the IRB hearing, the application judge had "pretty current information about the child" and "her voice [had] been heard".

[38] By order dated September 21, 2010, the application judge granted the Hague application, found the child to be wrongfully retained in Ontario and ordered her immediately and summarily returned to Mexico. He also directed the mother's counsel to deliver a copy of the IRB's decision and reasons, together with Dr. Bodnar's report, "forthwith" to "a person of authority at the Mexican Consulate".

[39] On October 14, 2010, with no forewarning, the child was taken from her school with police assistance, despite her vociferous objections, and placed in the care of her mother and some of her mother's counsel. She was flown to Mexico early the next morning.

[40] The father appealed the order of return. In addition, by Notice of Constitutional Question dated December 15, 2010, he challenged the constitutional validity of s. 46 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("CLRA"), which incorporates the Hague Convention into Ontario's domestic law, on the ground that it conflicts with Canada's obligations to refugees under s. 115 of the IRPA. In the same notice, the father also raised various *Charter*-based complaints.

(6) Fresh Evidence

[41] By order of this court dated March 30, 2010, the OCL was appointed as counsel for the child on this appeal.

[42] Extensive fresh evidence was filed by the OCL. It details discussions by OCL representatives with the child and officials from her former schools in Toronto. In particular, an affidavit sworn on April 5, 2011 by Shari Burrows, a clinical investigator with the OCL, describes interviews conducted by the OCL with the child on April 3 and 4, 2011. In her interviews, the child said that it had been "scary for her" since her return to Mexico. She described only one incident of physical abuse (when her mother allegedly hit her with a towel), but said that her mother had made veiled threats that the

abuse would continue once the proceedings in Canada concluded. She also said that her mother was "treating her badly emotionally" and had greatly restricted her mobility and contact with relatives, including her grandmother whom she had not seen in three months. She repeated her wish to return to Canada to live with her aunts. This account is largely repeated in a report by Bertha Mary Rodriguez, a social worker in Mexico engaged by the OCL to interview the child on its behalf on April 2, 2011, which forms part of the OCL's fresh evidence on appeal.

[43] The mother's fresh evidence on appeal indicates that, on her return to Mexico, the child was interviewed by a social worker and a psychologist from the DIF, a Mexican agency said to be the equivalent of Ontario's children's aid societies. An ensuing DIF report, dated March 14, 2011, does not document any abuse of the child by her mother.

[44] Finally, and alarmingly, the child ran away from her mother's home in Cancun on April 4, 2011. This development was of great concern to this court. At the date of oral argument, the child was in hiding and her mother was unaware of her whereabouts. However, other fresh evidence indicated that the OCL and the aunts, and possibly the grandmother, were in touch with the child and that she was "safe". Happily, at the date of these reasons, the child had safely returned to Ontario.

II. Issues

[45] The central question on this appeal is whether the application judge erred in ordering the child's return to Mexico. To answer this question, several issues must be addressed, which we frame as follows:

(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?

(2) Did the application judge err in ordering the child's return to Mexico by:

   (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?

   (b) failing to consider the exceptions to mandatory return set out under the Hague Convention?

   (c) failing to ensure the child's participation at the Hearing?

   (d) failing to otherwise conduct the Hearing in accordance with the principles of fundamental justice and procedural fairness?

III. Analysis

(1) Hague and Refugee Conventions

[46] As Canada's treaty obligations under the Hague and Refugee Conventions are relevant to all issues on appeal, we commence our analysis with a review of the relevant provisions of both Conventions.

(a) Hague Convention

[47] The Hague Convention, to which Canada is an original signatory, is implemented as part of Ontario's domestic law under s. 46 of the CLRA.[7] Its overarching principles, as stated in the preamble, are: (1) to treat the interests of children as paramount in matters relating to their custody; (2) "to protect children internationally from the harmful effects of their wrongful removal or retention"; and (3) "to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access".

[48] Article 1 expresses the important objects of the Convention:

> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[7] The full text of the relevant provisions of the Hague Convention is set out in Appendix A to these reasons.

[49] To accomplish these objects, the courts of the country of 'refuge' – the state in which an abducted child is found – "give effect to the custody orders made by the courts of the place of the child's habitual residence by directing that the child be returned to that place": *A. (J.E.) v. M. (C.L.)*, 2002 NSCA 127, at para. 23.[8] As explained in *A. (J.E.)*, at paras. 23-27, "Other than in exceptional circumstances, the best interests of children in custody matters should be entrusted to the courts in the place of the child's habitual residence" and the interests of children who have been wrongfully removed are "ordinarily better served by immediately repatriating them to their original jurisdiction": see also art. 16 of the Hague Convention; *Cannock v. Fleguel* (2008), 242 O.A.C. 221 (C.A.), at para. 21; *Katsigiannis v. Kottick-Katsigiannis* (2001), 55 O.R. (3d) 456 (C.A.), at para. 32; *Finizio v. Scoppio-Finizio* (1999), 46 O.R. (3d) 226 (C.A.), at para. 41; *W. (V.) v. S. (D.)*, [1996] 2 S.C.R. 108, at para. 38; *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at pp. 577-80. This court has accepted that, "Adhering to this philosophy ultimately discourages child abduction, renders forum shopping ineffective, and provides children with the greatest possible stability in the instance of a family breakdown": *Cannock* at para. 23.

[50] Article 3 of the Convention provides that the wrongful removal or retention of a child is established by the breach of a person's custody rights "under the law of the State in which the child was habitually resident" immediately before the wrongful removal or retention. Under art. 4, the Convention applies to any child under 16 years of age who

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[8] Also reported as *Aulwes v. Mai* (2002), 209 N.S.R. (2d) 248 (C.A.).

was "habitually resident in a Contracting State immediately before any breach of custody or access rights".

[51] Custody rights are given effect under the Hague Convention through proceedings for the return of an abducted child under art. 12: *Thomson* at p. 579. Article 12 establishes a mandatory policy for the return "forthwith" of wrongfully removed or retained children so long as, at the date of the commencement of a return proceeding, less than one year has elapsed from the date of the child's wrongful removal or retention. Under art. 11, contracting states commit to act expeditiously in proceedings for the return of children. A return application is therefore intended to be a summary proceeding.

[52] However, the mandatory return requirement under the Convention is subject to limited exceptions. As indicated in *Thomson*, at pp. 594-95, arts. 12, 13 and 20 provide for the discretionary refusal of an order of return where: (1) more than one year has elapsed since the removal and the child is settled into his or her new environment (art. 12); (2) the person, institution or other body having the care of the child was not exercising custody rights at the time of removal or retention or had acquiesced in the removal or retention (art. 13(a)); (3) the return would expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation (art. 13(b)); (4) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account its views (art. 13); or (5) the return would not be permitted "by the fundamental principles of the requested State relating to

the protection of human rights and fundamental freedoms" (art. 20). All these exceptions (except for the non-exercise of custody rights) are said to be engaged in this case.

(b) Refugee Convention

[53] Canada has ratified both the Refugee Convention and the *Protocol Relating to the Status of Refugees*.[9] In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 72, the Supreme Court explained that: "the Refugee Convention ... expresses a 'profound concern for refugees' and its principal purpose is to 'assure refugees the widest possible exercise of ... fundamental rights and freedoms' (Preamble)."

[54] Article 33 of the Refugee Convention codifies the principle of "*non-refoulement*". Broadly stated, this principle "prohibits the direct or indirect removal of refugees to a territory where they run a risk of being subjected to human rights violations": *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 281, at para. 19. Article 33(1) reads:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.

[55] The centrality of the principle of *non-refoulement* to international refugee protection schemes cannot be overstated. It has been described as "the cornerstone of the

[9] 31 January 1967, 606 U.N.T.S. 267.

international refugee protection regime" and aims at preventing human rights violations: *Németh* at paras. 18-19. Importantly, it is also complemented, and enlarged beyond its application to refugees, by international human rights law prohibitions on the removal of a person to a real risk of torture or other cruel, inhuman or degrading treatment or punishment or other forms of serious harm: see *e.g.*, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1485 U.N.T.S. 85, at art. 3(1); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, at art. 7; European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222, at art. 3; *Németh* at para. 19.

[56] In Canada, the statutory codification of the principle of *non-refoulement* is found in s. 115(1) of the IRPA. That provision states:

> A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.[10]

[57] Also relevant is art. 32 of the Refugee Convention, which stipulates in part that contracting states, "shall not expel a refugee lawfully in their territory save on grounds of national security or public order". Article 32 applies to persons lawfully present in the

[10] Under s. 95(2) of the IRPA, a "protected person" includes a Convention refugee.

country of refuge, including those recognized by the host country as refugees, while art. 33(1) is broader in scope, and applies to any person present in the country of refuge.[11]

(2) Does Section 46 of the CLRA Conflict with Section 115 of the IRPA?

[58] The parties accept that s. 46 of the CLRA[12] is validly enacted provincial legislation by which Ontario has recognized and implemented Canada's international obligations under the Hague Convention. However, in his Notice of Constitutional Question, the father attacks the constitutional validity of s. 46 of the CLRA on the ground that it conflicts with s. 115 of the IRPA and is therefore rendered inoperable under the constitutional doctrine of federal paramountcy.

[59] The Attorney General of Canada, the Attorney General of Ontario, supporting interveners and the mother argue that the question of the constitutional validity of s. 46 of the CLRA should not be considered by this court because it is raised for the first time on appeal. In the alternative, they maintain that the constitutional doctrine of paramountcy does not arise because there is no conflict between s. 46 of the CLRA and s. 115 of the IRPA. In a subsidiary argument, the Canadian Council of Refugees submits that the mother should have been required to seek to vacate or rescind the child's refugee status before initiating a Hague application.

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[11] The Refugee Convention recognizes certain exceptions to the mandatory prohibition on removal encompassed by the principle of *non-refoulement*. None of these exceptions, which relate to national security or public order concerns, is engaged in this case.

[12] We refer to s. 46 of the CLRA and the Hague Convention interchangeably in these reasons.

(a) Threshold issue

[60] Ordinarily, this court will decline to hear constitutional issues first raised on appeal: see *e.g.*, *Maharaj v. Maharaj* (2001), 150 O.A.C. 240 (C.A.), at para. 5; *Perez (Litigation Guardian of) v. Salvation Army in Canada* (1998), 42 O.R. (3d) 229 (C.A.), at p. 233. But this rule does not apply where the interests of justice require appellate determination of the constitutional issue.

[61] In our view, this is such a case. The Hague application proceeded on an uncontested basis, at least in part because it was brought on for hearing prior to the expiry of the time within which the father was entitled to file a response under the *Rules* and allegedly before he received timely notice of the hearing date. In these circumstances, it cannot be said that the father deliberately refrained from raising the constitutional issue before the application judge. Moreover, the interaction of s. 46 of the CLRA and s. 115 of the IRPA was fully argued before this court and no party identified a need to augment the record in relation to this issue. Finally, and critically, the implications of the child's refugee status are key to the question of whether her return to Mexico ought to have been ordered.

(b) Conflict claim

[62] The father's challenge to the constitutional validity of s. 46 of the CLRA hinges on the application of the doctrine of federal paramountcy. Recently, in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 69, the Supreme Court of Canada

explained that provincial legislation that is incompatible with federal legislation will be "rendered inoperative to the extent of the incompatibility". The court elaborated, at para. 75, that the onus is on the party arguing paramountcy to establish "either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law". We conclude that neither of these requirements is met in this case.

[63] First, the assertion of operational conflict: in our view, the Supreme Court's recent decision in *Németh* is dispositive of this issue. In *Németh*, the Supreme Court held, at paras. 24-31, that "removal" under s. 115 of the IRPA refers to removal processes under the IRPA, and does not apply to removal from Canada by surrender for extradition. On the authority of *Németh*, therefore, the prohibition on removal under s. 115 does not apply to removals effected under entirely different statutory schemes – in this case, under the Hague Convention's mandatory return process. On this basis, there is no operational conflict between s. 115 of the IRPA and s. 46 of the CLRA.

[64] Second, we do not accept that s. 46 of the CLRA frustrates the purpose of Canada's international *non-refoulement* obligations under s. 115 of the IRPA. We turn again to the Supreme Court's reasoning in *Németh*. At para. 33, Cromwell J., writing for the court, accepted that the broadly cast language of art. 33 of the Refugee Convention, which prohibits the removal of a refugee "in any manner whatsoever", applies to expulsion by extradition.

[65] *Németh* also affirms that, where possible, statutes should be interpreted in a manner consistent with Canada's international treaty obligations and principles of international law. As Cromwell J. indicated, at para. 34, it is therefore presumed that "the legislature acts in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community as well as in conformity with the values and principles of customary and conventional international law" (citations omitted).

[66] Finally, Cromwell J. held that Canada's *non-refoulement* obligations under the Refugee Convention could be fully satisfied by interpreting and applying s. 44(1)(a) of the *Extradition Act*, S.C. 1999, c. 18, which requires that a surrender be refused where it would be "unjust or oppressive having regard to all the relevant circumstances", as preventing the surrender of a refugee who faces a well-founded risk of persecution. This provision, together with general due process requirements at common law and under the *Charter*, prevents surrender of a refugee where to do so would offend the principles of fundamental justice.

[67] This reasoning is apposite here. As in the extradition context, the principle of *non-refoulement* is directly implicated where the return of a refugee child under the Hague Convention is sought. Nothing in the IRPA purports to exempt child refugees from the application of s. 115 in a Hague Convention case. Nor does the Hague Convention purport to elevate its mandatory return policy above the principle of *non-refoulement*.

[68] In our view, properly interpreted, the Hague Convention contemplates respect for and fulfillment of Canada's *non-refoulement* obligations. Specifically, art. 13(b) of the Hague Convention permits the refusal of an order of return concerning a child, who would otherwise be automatically returnable under art. 12, if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". In addition, art. 20 provides for the denial of an order of return if it would not be permitted "by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms". In accordance with the interpretive principles set out above, arts. 13(b) and 20 must be construed in a manner that takes account of the principle of *non-refoulement*.

[69] Moreover, in addition to its commitments under the Hague and Refugee Conventions, Canada acceded to the *Vienna Convention on the Law of Treaties*.[13] Articles 31(1) and 31(3)(c) of that Convention stipulate that a treaty is to be interpreted in good faith in light of its context, object and purpose and any applicable rules of international law. Consequently, under the Vienna Convention principles of treaty interpretation, the interpretation of the Hague Convention, which came into force in 1983, must take account of the Refugee Convention of 1951, as a relevant rule of international law in force at the time of entry into force of the Hague Convention. This

[13] 23 May 1969, 1155 U.N.T.S. 331.

ensures that s. 46 of the CLRA is interpreted in a manner consistent with Canada's treaty obligations under the Refugee Convention.

[70] This interpretive approach is also consistent with the Supreme Court of Canada's direction in *Canadian Western Bank*, at para. 75, that, "[t]he courts must never lose sight of the fundamental rule of constitutional interpretation that, '[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (citation omitted). It follows that, in construing s. 46 of the CLRA, the courts should avoid finding conflict with s. 115 of the IRPA where an alternate interpretation would avoid any collision between the two statutes.

[71] This may be achieved under art. 20 of the Hague Convention by construing Canada's "fundamental principles ... relating to the protection of human rights and fundamental freedoms" as including the principle of *non-refoulement*. Under both s. 115 of the IRPA and its international human rights obligations, Canada is prohibited from engaging in the *refoulement* of Convention refugees, including refugee children. Consequently, the exception to return under art. 20 is engaged in cases involving refugee children. In a similar fashion, recognition of the principle of *non-refoulement* is achieved under art. 13(b) of the Hague Convention by assigning appropriate weight to the decision of a competent Canadian authority, like the IRB, to accept refugee status for a child.

[72] What, then, is the significance of an IRB refugee determination on a Hague application? In order to grant a refugee claim, the IRB must be satisfied, on a balance of probabilities, based on evidence that it regards as trustworthy and reliable, that a refugee claimant faces a reasonable chance of persecution. Given its expertise and specialized knowledge, the decisions of the IRB on fact and credibility-driven issues are accorded a high degree of deference by the courts: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 47.

[73] However, as is customary in such hearings, the mother had no notice of the IRB hearing and no opportunity to participate, including no opportunity to respond to the serious allegations of abuse made against her. Further, pursuant to s. 170(g) of the IRPA, the IRB is not bound by any legal or technical rules of evidence. It may therefore receive and base a decision on untested evidence adduced in the proceeding: see *Kovacs v. Kovacs* (2002), 50 O.R. (3d) 671 (S.C.), at para. 82. In these circumstances, there is potential for the abuse of the IRB refugee determination process by an abducting parent to gain tactical advantage in a looming or pending custody battle. The courts must therefore be alert to any attempt to misuse the refugee protection scheme at the cost of Canada's obligations under the Hague Convention.

[74] That said, in our opinion, when a child has been recognized as a Convention refugee by the IRB, a rebuttable presumption arises that there is a risk of persecution on return of the child to his or her country of habitual residence. A risk of 'persecution' in

the immigration context clearly implicates the type of harm contemplated by art. 13(b) of the Hague Convention.

[75] This case is a powerful illustration of this point. A mere five months before the hearing of the Hague application, the IRB had concluded that the child was at sufficient risk of persecution, due to harm at the hands of her mother, to warrant recognition of refugee status. In these circumstances, while the IRB ruling granting refugee status to the child was not dispositive of whether the grave risk of harm exception to return under art. 13(b) of the Hague Convention was established, it nonetheless gave rise to a rebuttable presumption that this exception was engaged.

[76] *Németh* supports this conclusion. In *Németh*, Cromwell J. stressed, at para. 58, that while s. 115 of the IRPA does not preclude the extradition of Convention refugees, the exercise by the Minister of Justice of his power of surrender in relation to refugees must give "sufficient weight or scope to Canada's *non-refoulement* obligations in light of which those powers must be interpreted and applied". He elaborated at para. 105:

> [M]y view is that where a person has been found, according to the processes established by Canadian law, to be a refugee and *therefore to have at least a prima facie entitlement to protection against refoulement*, that determination must be given appropriate weight by the Minister in exercising his duty to refuse extradition on the basis of risk of persecution. [Emphasis added.]

[77] We recognize that there is no express duty under the Hague Convention to refuse to return a child on the basis of risk of persecution. The authority afforded under arts.

13(b) and 20 is discretionary in nature. However, as in the refugee extradition context, a child refugee has a *prima facie* entitlement to protection against *refoulement*.

[78] Accordingly, in our view, a determination of refugee status must be treated by a Hague application judge as giving rise to a rebuttable presumption of a risk of harm when determining whether to grant an order of return in respect of a refugee child. And, as *Németh* also holds at para. 106, there should be no burden on the child who has refugee status to persuade the application judge that "the conditions which led to the conferral of refugee protection have not changed".

[79] Nothing in the available Canadian authorities undercuts this conclusion. While several cases have confirmed, correctly, that neither Convention refugee status nor a claim for such status displaces Canada's obligations under the Hague Convention, none holds that Canada's *non-refoulement* obligations are irreconcilable with its obligations under the Hague Convention: see *Kubera v. Kubera* (2008), 60 R.F.L. (6th) 360 (S.C.), at paras. 63-64, aff'd on other grounds (2010), 3 B.C.L.R. (5th) 121 (C.A.); *Toiber v. Toiber* (2006), 208 O.A.C. 391 (C.A.), at paras. 11 and 12; *Kovacs* at paras. 106, 109-114; *Martinez v. Martinez-Jarquin*, [1990] O.J. No. 1385 (Prov. Ct.), at pp. 5-6.

[80] The need to consider a risk of persecution prior to returning a child under the Hague Convention is also supported in the English jurisprudence. In *Re S (Children) (Abduction: Asylum Appeal)*, [2002] EWCA Civ. 843, Laws L.J. commented at para. 25:

> Having regard to the rule as to the paramountcy of the child's interests arising under s. 1 of the Children Act 1989, I would respectfully suppose that a family judge would at the least pay very careful attention to any credible suggestion that a child might be persecuted if he were returned to his country of origin or habitual residence before making any order that such a return should be effected.

We adopt and endorse this observation.

[81] We note that the father relies on this court's decision in *J.H. v. F.A.* (2009), 265 O.A.C. 200, in support of his claim of conflict between s. 115 of the IRPA and s. 46 of the CLRA. That case does not assist him. *J.H.* involved the review of a family court order, made incidental to a custody order, prohibiting the removal of a child from Ontario in light of a removal order under the IRPA. This court held that family law court orders are not meant to frustrate the deportation of persons ordered removed under immigration legislation. The doctrine of federal paramountcy was not considered.

[82] Finally, and importantly, the requirement that a Hague Convention judge consider a risk of persecution on a Hague application involving a refugee child accords with the requirements of the *Convention on the Rights of the Child* ("CRC"),[14] to which Canada is a signatory. The jurisprudence of the Supreme Court of Canada consistently holds that the values reflected in international human rights law, and specifically those in the CRC, may help inform the contextual approach to statutory interpretation: see *e.g.*, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1

[14] 20 November 1989, 1577 U.N.T.S. 3.

S.C.R. 76, at paras. 31-32. The CRC provides that the best interests of the child shall be "a primary consideration" in "all actions concerning children" and, in some circumstances, may require the separation of the child from his or her parents: arts. 3 and 9. While the decision-maker should give the child's best interests "substantial weight", they "may be subordinated to other concerns in appropriate contexts": *Canadian Foundation for Children, Youth and the Law* at para. 10.

[83] In the Hague Convention context, the weight given to the child's best interests in the CRC strongly supports the conclusion that, in determining whether to grant an order of return in respect of a refugee child, the Hague application judge must treat the child's status as a refugee as giving rise to a rebuttable presumption of risk of persecution or other serious harm to be faced by the child if a return order is issued.

(c) Vacating refugee status

[84] The Canadian Council of Refugees, supported by the OCL, argues that in order to best reconcile s. 46 of the CLRA and s. 115 of the IRPA, the mother should have applied to vacate or rescind the child's refugee status prior to proceeding with her Hague application. Resort to this process, it is urged, would ensure that full respect is accorded to the principle of *non-refoulement*, while also permitting *viva voce* testimony and the presentation of other evidence by interested parties.

[85] We reject this argument. First, the Supreme Court held in *Németh*, at para. 51, that the Refugee Convention does not bind contracting states to any particular process "for

either granting or withdrawing refugee status". As a result, the court indicated, extraditing a Convention refugee without first setting aside a finding of refugee status "is not problematic from an international law point of view, provided that the extradition authorities give due weight to the obligation of *non-refoulement* by fairly examining the question of whether the risk of persecution persists": *Németh* at para. 52. These comments are equally applicable to proceedings under the Hague Convention. There is therefore no need for the IRPA process to 'trump' the Hague Convention regime.

[86] Second, as we have emphasized, Hague Convention proceedings are intended to be summary in nature. There is no assurance that this would necessarily be achieved under the IRPA process for revocation of refugee status. In addition, an aggrieved custodial parent of a refugee child cannot apply directly to the IRB to vacate a decision allowing a child's claim for refugee protection. Under s. 109(1) of the IRPA, only the Minister of Citizenship and Immigration may apply to the IRB for this purpose, and the Minister's power is discretionary. We therefore do not agree that resort to IRPA procedures affords a 'process advantage' over the Hague Convention scheme.

(d) Conclusion

[87] To conclude on this issue, the case for conflict between s. 115 of the IRPA and s. 46 of the CLRA fails and the doctrine of federal paramountcy does not arise. A finding of refugee status accorded by the IRB to a child affected by a Hague Convention application gives rise to a rebuttable presumption that the removal of the child from

Canada will expose the child to a risk of persecution, that is, to a risk of harm. In these circumstances, Canada's *non-refoulement* obligations and the import of a child's refugee status must be considered under the art. 13(b) (grave risk of harm) and art. 20 (fundamental freedoms) exceptions to mandatory return under the Hague Convention.

(3) Did the Application Judge Err in Ordering the Child's Return to Mexico?

[88] A Hague application judge's decision attracts considerable deference from this court. As the mother's counsel stressed during oral argument, appellate review of a Hague decision is not a hearing *de novo* or an invitation to relitigate the matters determined on the application: *Katsigiannis* at para. 30; *Korutowska-Wooff v. Wooff* (2004), 242 D.L.R. (4th) 385 (C.A.), at para. 10. But, the deference usually accorded to a Hague ruling is displaced where the Hague application judge applied the wrong legal principles or made unreasonable findings of fact: see *Jabbaz v. Mouammar* (2003), 171 O.A.C. 102 (C.A.), at para. 36; *Katsigiannis* at para. 31. Moreover, standard of review considerations are irrelevant where a breach of natural justice or hearing unfairness is established.

[89] In this case, the one-sided nature of the Hearing undoubtedly hampered the application judge's task. With no involved responding party, he was confronted with less than a comprehensive 'paper' record, submissions from only one party to the dispute and the obligation to determine the issue of the child's return promptly. Further, as is frequently the case on a summary Hague application, the child whose return was sought

was not before the court. However, a Hague application judge has the authority to arrange for the child to be brought before the court to express his or her views and preferences regarding the return request and, in exceptional cases, to require *viva voce* testimony from witnesses: *Cannock* at para. 36; *De Silva v. Pitts* (2008), 232 O.A.C. 180 (C.A.), at para. 46; *Cornfeld v. Cornfeld*, [2001] O.J. No. 5773 (C.A.), at para. 5, *per* Charron J.A. (in chambers).

[90] It is against this backdrop that we consider the father's and the OCL's claim that the Hearing was fatally flawed and that the application judge made several errors justifying this court's intervention.

(a) Failing to consider the child's refugee status

[91] The application judge was aware of the IRB's decision granting the child refugee status. Nonetheless, the Hearing transcript provides no comfort that he accorded any real weight to the child's refugee status or to her entitlement to protection from *refoulement*. These were essential considerations on the inquiry as to whether the grave risk of harm and fundamental freedoms exceptions to return were triggered. We discuss this issue further in the next section of our reasons.

(b) Failing to consider exceptions to mandatory return

[92] The father and the OCL submit that the application judge erred by failing to consider the exceptions to mandatory return set out under the Hague Convention. We agree with this submission.

[93] The transcript of the Hearing reveals that the application judge was alive to some of the relevant issues under the Hague and Refugee Conventions and raised them with counsel. However, it also confirms that he did not pursue most of his initial inquiries of counsel on these issues. Based on his failure to do so, and in the absence of reasons for his decision, we cannot be satisfied that he addressed the exceptions to return that were critical to the decision whether to order the child's return to Mexico. On this ground alone, the order of return cannot stand and a new Hague Convention hearing is necessary.

Grave risk of harm and fundamental freedoms exceptions

[94] As we have indicated, the child's refugee status gave rise to a rebuttable presumption that her return to Mexico would expose her to a risk of persecution and, hence, to risk of harm within the meaning of art. 13(b) of the Hague Convention. This required the application judge, in determining whether to grant an order of return, to assess the existence and extent of any persisting risk of persecution to be faced by the child in Mexico.

[95] Further, the record before the application judge included affidavit materials that, on their face, called into question some of the exceptions to return including, particularly, art. 13(b). It also indicated that the IRB had found the child to be a credible witness, accepted her refugee claim on the basis of abuse by her mother, and concluded that she had rebutted the strong presumption of Mexico's capacity to adequately protect her.

This evidence cried out for a meaningful assessment of whether and to what extent the child faced a persisting risk of persecution if she was returned to Mexico.

[96] This risk assessment was not undertaken. Indeed, the transcript contains no reference to arts. 13(b) or 20 at all. Instead, having recognized that the Refugee Convention was in play, the application judge appears to have simply accepted, without further inquiry, the mother's bald denial of any abuse and counsel's representations that the child's abuse claims were "highly incredibl[e]" and inconsistent with the mother's evidence regarding her relationship with the child.

[97] Moreover, by virtue of her status as a Convention refugee, the child's s. 7 *Charter* rights to life, liberty and security of the person were engaged on the Hague application. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 210, the Supreme Court held, in respect of refugee claimants, that due to the severe consequences of the denial of refugee status for those persons with a "well-founded fear of persecution", it is "unthinkable that [s. 7 of] the *Charter* would not apply to entitle them to fundamental justice in the adjudication of their status". The Supreme Court has also recognized that s. 7 *Charter* rights are implicated when it is sought to detain a permanent resident or foreign national on national security grounds or to remove a Canadian citizen or a Convention refugee from Canada under the IRPA and extradition processes: see *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, at paras.

2-4; *Németh* at para. 70; *United States v. Burns*, [2001] 1 S.C.R. 283, at para. 59; *Suresh* at paras. 76-79.

[98] There is no principled reason why a refugee child's s. 7 *Charter* rights are not similarly engaged where the child's involuntary removal under the Hague Convention from Canada to a country where the child has already been found to face a risk of persecution is sought. As a result, the return of a refugee child under the Hague Convention must be effected in accordance with the principles of fundamental justice. As a matter of procedural protection, these principles require a fair process that takes account of various sources of international human rights law: *Suresh* at para. 46.

[99] It follows that, on an 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.

[100] This conclusion is buttressed by existing authorities regarding the circumstances in which an assessment of the risk of persecution must be undertaken: see *Németh* at para. 114 (in the context of a removal pursuant to the power of surrender under the *Extradition Act*); *Ragupathy v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 490 (F.C.A.), at paras. 18-19 (in the context of the proposed deportation of a refugee under one of the statutory exceptions to the principle of *non-refoulement*); *Suresh* at paras. 76-79 (in the context of the removal of a refugee to face risk of torture).

[101] We therefore conclude that the application judge's failure to conduct the risk assessment mandated by the child's refugee status, the evidentiary record and the child's s. 7 *Charter* rights is fatal to the order of return.

Settlement in environment exception

[102] The exception to return under art. 12 was also relevant on the facts before the application judge.

[103] This exception recognizes that, after one year from the date of removal, "the interests of a child in not having his or her 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" (citation omitted): *Kubera* at para. 38. Further, as Levine J.A. elaborated in *Kubera*, at para. 38, with the passage of time, those policies "that require consideration of the welfare and interests of the particular child tend to strengthen", while those policies favouring mandatory return tend to weaken. Thus, the concept of 'settlement' under art. 12 "includes both a factual assessment of the child's integration in the new environment, and a purposive and contextual analysis of the policy of the [Hague] Convention as it relates to the specific circumstances of the child": *Kubera* at para. 43.

[104] In other words, art. 12 requires, in part, a highly "child-centric" factual inquiry aimed at determining the actual circumstances of the child at the time of the hearing and

"the likely effect of uprooting a child who has already been the victim of one international relocation": *Kubera* at paras. 46, 48 and 51; *A. (J.E.)* at paras. 61, 67.

[105] In this case, at the time of the Hearing, the child had been in Ontario with the aunts for almost 21 months. The application judge was certainly alive to the importance of obtaining current information regarding her circumstances. However, this was impeded by the prior court order which precluded the aunts' participation in and legal representation for the child at the Hearing. That order is questionable in the circumstances of this case. Had it not been made, the participation of the aunts or that of the child's counsel would have ensured the provision of this very necessary information.

[106] We note that the application judge did inquire of counsel as to whether counsel had "any more recent information", queried whether the court should obtain current information about the child – a matter he described as "not an insignificant part" of his considerations – and indicated that he would have no hesitation in seeing the child himself, but for his concern not "to make it worse". Having expressed these concerns, it appears that the application judge was satisfied that the available evidence regarding the child's circumstances was adequate and sufficiently current.

[107] With respect, in so concluding, the application judge erred. Although it detailed her allegations of abuse and aspects of the procedural history of the case, the evidentiary record contained virtually no specific information about the child's life in Toronto. After

nearly two years in Toronto, her actual circumstances at the time of the Hearing were highly relevant.

Objection to return exception

[108] Article 13 authorizes the refusal of an order of return if a child objects to the return and has attained "an age and degree of maturity at which it is appropriate to take into account its views".

[109] In the context of a child refugee, the views of the child gain greater importance. As the exercise of authority to return the child to Mexico engaged her s. 7 *Charter* rights, her return could only be effected in accordance with the principles of fundamental justice. Those principles required that her views be considered on the Hague application in accordance with her age and maturity: see *e.g.*, *Németh* at para. 70. The fact that the child was not a party to the application does not detract from her right to be heard.

[110] This conclusion is supported by two further considerations. First, s. 64(1) of the CLRA states that the court "where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them", and s. 64(2) authorizes the court to interview the child "to determine the views and preferences of the child." While s. 64 applies in the context of custody, access and guardianship proceedings, recognition of the child's right to be heard on the Hague application conforms with the spirit and intent of s. 64 of the CLRA: see *De Silva* at para. 46.

[111] Second, art. 12(1) of the CRC stipulates that the views of a child are to be given due weight according to the child's age and maturity and that a child has the right "to express those views freely in all matters affecting the child". Article 12(2) of the CRC confirms this right in the context of "judicial and administrative proceedings affecting the child".

[112] At almost 14 years of age, the child in this case was clearly of an age and potential maturity such that her objection to return to Mexico had to be considered. The Hearing transcript reveals that the application judge recognized this. He indicated that the child's objection was not the "deciding factor" but went on to observe that, "[T]here is a 13 year old or a 14 year old who we are making decisions about and she has had no direct involvement."

[113] In response, counsel argued that the Hague Convention did not give the child "the right to be directly involved", that it merely required that "her voice ought to be heard in appropriate circumstances", and that "her voice [had] been heard". Once again, unfortunately, the application judge accepted these submissions without further inquiry.

[114] With respect, this was an error. Given the child's age, the nature of her objection, her status as a Convention refugee, the length of time that she had been in Toronto, and the absence of any meaningful current information regarding her actual circumstances in Toronto at the date of the Hearing, her views concerning a return to her mother's care in Mexico were a proper and necessary consideration.

Acquiescence in wrongful retention exception

[115] Finally, given the duration of the child's stay in Toronto (approximately 21 months) and of her mother's delay in commencing her Hague application in Ontario (about 18 months), the question arose in this case as to whether the mother had eventually "acquiesced" in the child's retention in Ontario by the father and the aunts within the meaning of art. 13(a) of the Hague Convention.

[116] When the application judge raised the issue of delay, the mother's counsel attempted to disassociate the mother from any responsibility for the delay, stating "I don't think we can fairly say the delay is hers". Counsel then added, "I think the Central Authority actually sat on this for a while before doing anything about it." The first statement was a matter of advocacy. The second statement was entirely unsupported by any evidence.

[117] The mother, in effect, denied acquiescence and offered an explanation for the delay in bringing her Hague application. Delay alone is generally insufficient to establish acquiescence under art. 13(a): see *Ibrahim v. Girgis* (2008), 232 O.A.C. 191 (C.A.), at para. 28. In these circumstances, although the evidence of acquiescence may have been weak, this exception merited consideration by the application judge.

(c) Failing to ensure the child's participation at the Hearing

[118] The father and certain interveners also argue that, because her s. 7 *Charter* rights were engaged, the child had a right to participate in the Hearing. In *Suresh*, at para. 113,

the Supreme Court held that the same principles underlying the common law duty of procedural fairness underlie the procedural protections required by s. 7 of the *Charter* and that those protections must be applied "in a manner sensitive to the context of specific factual situations". In *Németh*, at para. 70, the court held that these protections "generally [include] adequate disclosure of the case against the person sought, a reasonable opportunity to respond to it and a reasonable opportunity to state his or her own case" (citations omitted): see also *Suresh* at paras. 121-26; *Charkaoui* at para. 61.

[119] Based on this clear and consistent direction from the Supreme Court, we conclude that the same procedural protections apply to a refugee child whose return from Canada to a foreign jurisdiction is sought under the Hague Convention.

[120] An order of return under the Hague Convention has a profound and often searing impact on the affected child. Where the proposed return engages the child's s. 7 *Charter* rights, as in this case, meaningful procedural protections must be afforded to the child. In our view, these include 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 respond to that case: (4) a reasonable opportunity to have his or her views on the merits of the application considered in accordance with the child's age and level of maturity; and (5) the right to representation.

[121] In addition, at this point in the development of the law, there can be no serious debate that the affected parties, including the refugee child, are entitled to reasons for the

Hague application judge's decision: see *R. v. Sheppard*, [2002] 1 S.C.R. 869, at paras. 24 and 55; *Young v. Young* (2003), 63 O.R. (3d) 112 (C.A.), at paras. 26-27; *Lawson v. Lawson* (2006), 81 O.R. (3d) 321 (C.A.), at paras. 8-10; *F.H. v. McDougall*, [2008] 3 S.C.R. 41, at paras. 98-100; *R. v. R.E.M.*, [2008] 3 S.C.R. 3, at paras. 8-14.

[122] In this case, the child received no notice of the Hague application or of the return date for the Hearing. Her views and preferences were not sought or obtained at the Hearing, nor, despite her aunts' efforts, was she represented by counsel at the Hearing. In these circumstances, we have no hesitation in concluding that the child was denied procedural fairness and that her s. 7 *Charter* rights were infringed.

(d) Failing to otherwise conduct the Hearing in accordance with the principles of fundamental justice and procedural fairness

[123] Two other matters must be addressed. We consider, first, the issue whether an oral hearing is required on a Hague application involving a refugee child.

[124] Given the strong commitment under the Hague Convention to expeditious proceedings and the need for the prompt return of an abducted child, this court has repeatedly recognized that the receipt of *viva voce* evidence on a Hague application should occur only in exceptional circumstances: *Cannock* at paras. 33-37; *Katsigiannis* at para. 59. Moreover, even in cases where s. 7 of the *Charter* is in play, an oral hearing is not always required: *Singh* at para. 58.

[125] Where, however, serious issues of credibility are involved, fundamental justice requires that those issues be determined on the basis of an oral hearing: *Singh* at para. 59. This applies with equal force to the determination of serious credibility issues in Hague applications involving refugee children. Expediency will never trump fundamental human rights.

[126] In this case, there is conflicting evidence as to whether the child was the victim of abuse by her mother. However, the child was accepted as a Convention refugee on the basis of that abuse and her abuse allegations have now been corroborated by affidavit evidence from her grandmother and, to a certain extent, by other fresh evidence filed with this court. In the face of that evidence, the mother's continued denial of any abuse of the child will require credibility-based factual findings. Similarly, the determination of whether any of the exceptions to return under the Hague Convention are made out in this case requires fact-based inquiries and findings. Finally, the child herself must have a voice and an opportunity to participate at the new Hague Convention hearing. We therefore conclude that this is the type of exceptional case in which the record must be supplemented by *viva voce* evidence.

[127] Second, the father argues that his s. 7 *Charter* rights were breached when the mother obtained a return date for the Hearing prior to the expiry of the 60-day period allowed under the *Rules* for a response to the Hague application. We have already concluded that a new Hague Convention hearing must be ordered. It is therefore

unnecessary for the disposition of this appeal to address this additional complaint by the father.

[128] That said, we offer this observation. A Hague Convention application has a potentially life-altering affect on all interested parties, including, of course, on the parents of a child whose return is sought. It is therefore axiomatic that the courts must be vigilant in ensuring procedural fairness for all concerned. The *Rules* provide important safeguards in this respect, including provisions for proper notice of a Hague Convention application and the permissible time period for a response to such an application. Judges must therefore be vigilant in ensuring that the protective purposes of the *Rules* are not disregarded or circumvented in respect of Hague Convention applications.

IV. Stay Application

[129] At the outset of oral argument of this appeal, it emerged that the child was still in hiding in Mexico. The mother therefore moved for a stay of the appeal pending the child's return to her in Cancun. We denied the stay request because, in our opinion, it met none of the applicable requirements for the granting of a stay order. Moreover, and importantly, the interests of justice required that the issues raised on this appeal be determined promptly on the merits.

V. Remedy

[130] For the reasons given, we conclude that a new Hague Convention hearing must be held. It is appropriate that at that hearing:

(1) the record before this court, including the fresh evidence received on consent, be placed before the Hague application judge;

(2) the child be provided with a copy of all materials filed with the Hague application judge;

(3) the child be represented by the OCL, or such other counsel as she may determine;

(4) the child be given an opportunity to present evidence, including in response to the mother's evidence; and

(5) proper and timely notice of the return date for the new hearing be provided to the father, the child and, in the unique circumstances of this case, the aunts.

[131] At the date of the release of these reasons, it appeared that the child had returned to Toronto in order to participate in the new Hague Convention hearing and that her care and supervision pending that hearing had been settled by court order. In these circumstances, further direction from this court regarding her return from Mexico is unnecessary.

VI. Disposition

[132] For these reasons, the appeal is allowed. We do not regard this case as an appropriate one in which to award any costs of the appeal.

RELEASED JUN - 2 2011

E.A. Cronk J.A.

R.R. Reese J.A.

Mac Rutland JA

Appendix A

Convention on the Civil Aspects of International Child Abduction, 25 October 1980, 1343 U.N.T.S. 89

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Chapter I — Scope of the Convention

Article 1

The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Despite the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.