COURT OF APPEAL FOR ONTARIO

CITATION: M.A.A. v. D.E.M.E., 2020 ONCA 486
DATE: 20200729
DOCKET: C68182

Benotto, Fairburn and Jamal JJ.A.

BETWEEN

M.A.A.

Respondent
(Applicant/Respondent on Cross-Application)

and

D.E.M.E.

Appellant
(Respondent/applicant on Cross-Application)

and

The Office of the Children's Lawyer

Counsel for the Children

Sarah Clarke and Cheryl Robinson, for the appellant

Daryl Gelgoot, Vanessa Amyot and Barbara Jackman, for the respondent

Sheena Scott, Caterina Tempesta and Roger Rowe, for the Office of the Children's Lawyer

Michael Bossin, Laïla Demirdache, Jacqueline Bonisteel, and Jamie Chai Yun Liew, for Amnesty International Canada

Archana Arun Medhekar, for the Barbra Schlifer Commemorative Clinic

Maureen Silcoff and Adam B. Sadinsky, for the Canadian Association of Refugee Lawyers

Lorne Waldman, Charles Steven and Sumey Mulla, for the United Nations High Commissioner for Refugees

Heard: July 7, 2020 by video conference

On appeal from the order of Justice Lucy K. McSweeney of the Superior Court of Justice, dated February 19, 2020, with reasons reported at 2020 ONSC 1109.

Benotto J.A.:

[1] The appellant is the mother of three children now ages 4, 7, and 11. Two years ago, she brought them from Kuwait to Canada without the respondent father's consent. On arrival in Canada, she sought refugee status for herself and the children. She claims she fled an abusive relationship that put her safety and that of her children at risk of serious harm. The father denied the allegation and claimed that she wrongfully kidnapped the children.

[2] The father applied for an order requiring that the children be returned to Kuwait. The mother asked Ontario to exercise jurisdiction to decide her custody claim. The basis for her claim was s. 23 of the *Children's Law Reform Act*, R.S.O., 1990, c. C.12 (*CLRA*), which, despite other jurisdictional limits, permits an Ontario court to exercise its jurisdiction to make custody and access orders where the child is physically present in Ontario and the court is satisfied on a balance of probabilities that the child(ren) would suffer serious harm if removed from Ontario.

[3] The application judge found that Ontario did not have jurisdiction under s. 23 because there was no risk of serious harm to the children. She ordered the children returned to Kuwait.

[4] The mother appeals. She submits that the application judge erred in her determination of "serious harm" or, in the alternative, that the application should have been adjourned pending a determination of the refugee status. The mother's appeal is supported by the Office of the Children's Lawyer (OCL) and the four interveners: United Nations High Commissioner for Refugees (UNHCR), Canadian Association of Refugee Lawyers (CARL), Amnesty International Canada, and Barbra Schlifer Commemorative Clinic.

[5] I conclude that the application judge erred in her treatment of the children's evidence provided through the OCL. That evidence establishes a risk of serious harm. Ontario therefore has jurisdiction under s. 23 to make a custody and access order. I also conclude that it was an error to order the return of the children to Kuwait in the face of their asylum claim.

FACTS

[6] The mother and father are Jordanian citizens. They married in Kuwait on May 30, 2008, where they continued to live with their three children: a son I.A., born May 2009; a son A.A., born May 2013; and daughter H.A., born December 2015.

[7] The family appeared to have a successful life in Kuwait. Both parents worked, the mother as a senior human resources executive and the father for various financial institutions and a car resale business. The boys attended the British School of Kuwait. The family socialized with extended family and friends and participated in community and extracurricular activities with the children.

[8] On March 14, 2018, an incident occurred which led to the separation of the parties. The mother alleges that she was attacked by the father in front of the children. She says that this was part of a pattern of ongoing personal and sexual violence that she suffered and could no longer tolerate. The police were called and advised the parties not to bring charges. The father denies the allegations.

[9] The parties separated and commenced court proceedings in the Hawally Family Court in Kuwait. The mother and children stayed in the family home and the father had access every Friday for twelve hours and on certain holidays.

[10] Two months later, on May 14, 2018, the mother left Kuwait with the children and sought refugee status in Canada. She did not seek the father's consent, nor did she advise him in advance.

[11] On October 3, 2018, the father commenced an application in Ontario under the *CLRA*, seeking the return of the children to Kuwait.

[12] The mother filed a cross-application requesting that the court assume jurisdiction for custody and access. She submitted that the children would suffer

serious harm if returned to Kuwait. She said the father had been violent towards her and the children and they were afraid of him. She referred to a legal system in Kuwait that cannot protect her or the children in a meaningful way. An affidavit from a legal expert on Sharia law and statutory law in Kuwait was filed.

[13] The application judge appointed the OCL and requested a Voice of the Child Report for the oldest boy, I.[1] The child described his father as mean, angry, and threatening. He described being hit with a belt and threatened with a hot iron. He said that while in Kuwait, his mother would protect him from his father, that his father would threaten to hurt him and that when he did this, his mother would "get in his way" thereby protecting him.

[14] Mary Polgar, a Clinical Investigator with the OCL, interviewed I. and his brother A. Both children told her that they saw their father grab their mother on March 14, 2018. When describing the event, A. grabbed and squeezed his own mouth. I. said he did not know if it was "choking or something else bad". The children were also interviewed by Mahesh Prajapat of the OCL.

[15] Dr. Vincent Murphy, a child psychologist, conducted an assessment of I. He concluded that I.'s logical-analytical and holistic problem-solving skills are at or slightly above the level of an average-age peer. Further, I. "was fairly consistent in

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[1] A Voice of the Child Report presents the views and preferences of the child to represent the child's viewpoint in a family matter.

what he had to say, both about fear of his father abusing him were he to return to Kuwait, and in his desire to stay in Canada".

[16] The father strenuously denied all allegations of abuse. He tendered evidence from seven witnesses including the children's nanny that he was not a violent person, that they never witnessed abuse, and that he was a loving father. The children's doctor wrote a letter confirming that he had never seen any signs of abuse. The father claimed that the mother only returned to Canada to be with her family and that the allegations of abuse are a ruse.

[17] The application judge had originally planned to await the outcome of the refugee proceedings. However, in February 2019 when that determination had not been made, she released her decision.

DECISION OF THE APPLICATION JUDGE

[18] The application judge addressed the requirements of s. 23 of the *CLRA*, which authorizes the court to assume jurisdiction to make or to vary an order in respect of the custody of or access to a child if the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if the child is removed from Ontario.

[19] The application judge concluded that the mother had not established that the children would suffer serious harm. She did not accept the mother's allegations of abuse. She found that:

> When cross-examined on her affidavits, [the mother's] testimony was inconsistent, contradictory, and contradicted by other evidence, including other witnesses and her own documentary evidence. At times, she exaggerated her evidence. She omitted important details which did not serve her narrative. When challenged to provide detail, she was evasive and argumentative with counsel.

[20] The application judge's concerns included the fact that the mother had not mentioned the sexual violence before her testimony in court, nor did she mention the physical abuse of the children by the father.

[21] The application judge further considered the submission that the Kuwaiti courts would be biased against her and concluded that the expert evidence did not support her contention that she would not be fairly treated in Kuwait.

[22] With respect to the evidence of I., the application judge said:

> …I find I cannot give much weight to his views because they have been influenced by his mother.

She accepted I.'s maturity for the purpose of considering his views but concluded that:

> He wishes to remain in Canada because he wants to stay with his mother, his asthma is better here, and Canada is a peaceful place to live.

Relying on *Andegiorgis v. Giorgis*, 2018 ONCJ 965, she determined that these reasons were not "substantial" and that:

> An overall preference for Canada is not a factor to ground an assumption of jurisdiction by this court.

[23] Since the application judge was not satisfied that the children were at risk of serious harm, she concluded that Ontario did not have jurisdiction. She then proceeded under s. 40 of the *CLRA* to order the return of the children to Kuwait.

[24] With respect to the children's refugee claim she stated:

> The existence of a refugee claim or an ongoing hearing before the Refugee Protection Division does not require the court on a removal application to stay its process until the determination in the refugee process. Although not required by law, I did attempt to avoid concurrence of the refugee and *CLRA* proceedings in this application by granting an initial, and then subsequent, adjournment to permit the scheduled refugee hearing to conclude. The refugee hearing did not conclude in a reasonable time and I ultimately ruled that this hearing would be brought to conclusion.

POSITIONS OF THE PARTIES

[25] The mother submits that the application judge erred in her credibility analysis of the mother in a number of ways including by employing unfounded myths about typical behaviour of a victim of sexual violence and by rejecting the expert evidence relating to family law in Kuwait. The error as to the credibility analysis then tainted the application judge's consideration of the children's evidence. In the result, she effectively gave no weight to the children's evidence and failed to properly analyze the best interests of the children. Further, by ordering their return to Kuwait, she undermined their rights to have their refugee claim determined. The mother

submits that the court has two options: adjourn the entire application until the children's refugee status is determined; or consider the risk to the children and accept that Ontario has jurisdiction.

[26] The OCL submits that given the uncontroverted expert and social work evidence that the children face the risk of serious emotional, psychological, and physical harm if returned to Kuwait, and the expert assessment that their evidence was independent of the mother's influence, the application judge was compelled to accept that evidence. The failure to do so is a reversible error. The OCL also submits that the entire matter – including the consideration of serious harm – should have been adjourned until the refugee status is determined.

[27] The father submits that the application judge's findings as to credibility are entitled to deference and it was open to her to treat the children's evidence as she did. There has been, he submits, a significant delay already during which time the father has been unable to be with his children. He submits that it would have been an error to adjourn the return order simply because the refugee claim has not yet been determined. (To date, the delay has been 27 months). The father requests that application judge's return order be respected.

POSITIONS OF THE INTERVENERS

United Nations High Commissioner for Refugees (UNHCR)

[28] UNHCR submits that the application judge erred by ordering the children returned while there is an outstanding refugee application. It submits that the provisions of the *CLRA* must be informed by principles of non-refoulement set out in the 1951 *Convention relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 150 (the "1951 Refugee Convention"). An order requiring the return of the children before a full review of the merits of the asylum claim violates the *Charter* rights of the children, Canada's obligations under the 1951 Refugee Convention and the *Convention on the Rights of the Child*.

Canadian Association of Refugee Lawyers (CARL)

[29] CARL submits that a child who is subject to return proceedings should benefit from the assessment of their refugee claim prior to the return matter proceeding. The Refugee Protection Division of the Immigration and Refugee Board of Canada is a specialized tribunal with institutional expertise, and it is best situated to conduct this inquiry.

Amnesty International Canada (Amnesty)

[30] Amnesty submits that Canadian courts must interpret domestic law (here the *CLRA*) in conformity with Canada's intersecting international obligations including the *Convention on the Rights of the Child.* Refugee claimants should not

be ordered returned to a country before their claim for refugee protection has been determined. The issuing of a family law return order before the determination of the refugee claim is an error.

Barbra Schlifer Commemorative Clinic (the Clinic)

[31] The Clinic submits that when assessing the credibility of evidence to determine the risk of harm on a balance of probabilities under s. 23 of the *CLRA*, the Family Court should consider the legal framework of the *Act* in its entirety and read the section through a gender-based violence lens, which would include the harmful effects of domestic violence on children.

NEW EVIDENCE AND ITS ADMISSIBILITY

[32] All parties have filed new evidence.[2]

[33] When the welfare of a child is at stake the courts adopt a flexible approach to the admission of new and/or fresh evidence consistent with the need for up-to-date information on children and matters relevant to their best interests: *H.E. v. M.M.*, 2015 ONCA 813, 393 D.L.R. (4th) 267, at paras. 70-75. I have considered and rely on the new evidence.

[34] Since the removal order was granted, the mother has been convicted in Kuwait of kidnapping the children. She was ordered to pay a fine and to be “on

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[2] Since the evidence did not exist at the time of the decision under appeal, I prefer the term “new” instead of “fresh” evidence.

good behaviour" for a year. The father now has two court orders in Kuwait: an order granting him custody of the children and an "obedience order". The obedience order obligates the mother to "enter into submission" to her husband and "obey her husband". The father says that he obtained the orders so that the mother would have a home to come back to.

[35] Meanwhile, Dr. Murphy has met with the children again. He met with I. more than once and reported that his anxiety is heightened. I. does not see a scenario where he can be in Kuwait and be safe from his father. I. has experienced an increase in physical complaints associated with anxiety, most notably insomnia, nightmares, lack of appetite, and gastrointestinal issues.

[36] The OCL also tendered new evidence in the form of a Clinical Panel member's affidavit stating that when she informed I. of the court's decision that he return to Kuwait, he spontaneously and powerfully responded "NO", asking to speak to the judge. When advised that he might have to live with his father, his response was, "…do they not understand that my dad hit me and did bad things to me?"

ISSUES

[37] These issues are best addressed in two stages:

1. the serious harm analysis under s. 23 of the *CLRA*; and
2. the effect of the refugee claim on the application.

ANALYSIS

(1) Serious harm under s. 23

[38] Child abductions (also called “wrongful removals” or “wrongful retentions”) can greatly harm children and seriously disrupt relationships with parents. Canada is a signatory to an international agreement entitled the *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can. T.S. 1983 No. 35 (entered into force 1 December 1983) (the “*Hague Convention*”). The *Hague Convention* aims to return children to the country where they are classed as “Habitually Resident” based on the belief that the courts in the country of habitual residence are generally best-placed to deal with the issues of where and with whom the child should live. The *Hague Convention* is incorporated into Ontario law through s. 46 of the *CLRA*. With respect to non-signatory countries, the *CLRA* applies and reflects the *Hague Convention’s* goals of discouraging child abductions by confining Ontario jurisdiction over custody to limited circumstances. This is one of those circumstances.

[39] The legislature and the courts are alive to the potential damage to children’s well-being caused by abductions and seek to discourage self-help attempts by parents in custody disputes. At the same time, even in the face of a wrongful removal from another jurisdiction, s. 23 of the *CLRA* carves out an exception where

the child is physically present in Ontario and the court is satisfied on a balance of probabilities that the child would suffer serious harm if removed from Ontario.

[40] The threshold for engaging the harm exception differs under the *CLRA* and under the *Convention*: *Ojeikere v. Ojeikere*, 2018 ONCA 372, 140 O.R. (3d) 561, at paras. 111-114.

[41] Here, the father seeks a return of the children to their habitual residence of Kuwait, which is not a signatory to the *Hague Convention*. The *CLRA* alone applies.

[42] Section 23 sets out a serious harm exception to the limits on Ontario's jurisdiction to make custody and access orders established by ss. 22 (jurisdiction) and 41 (enforcement of extra-provincial orders):

> **Serious harm to child**
>
> **23** Despite sections 22 and 41, a court may exercise its jurisdiction to make or to vary an order in respect of the custody of or access to a child where,
>
> (a) the child is physically present in Ontario; and
>
> (b) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,
>
> (i) the child remains in the custody of the person legally entitled to custody of the child,
>
> (ii) the child is returned to the custody of the person legally entitled to custody of the child, or
>
> (iii) the child is removed from Ontario.

[43] This court has determined that the serious harm analysis under the *CLRA* is less stringent than the "intolerable situation" test under the *Hague Convention.* Laskin J.A. came to this conclusion in *Ojeikere*, at paras. 59-61 because of the different wording used in the *CLRA* and also:

> … because under the preamble to the *Convention* all signatories accept and are "firmly convinced that the interests of children are of paramount importance in matters related to their custody". Signatories have accepted this principle and its enforcement by their agreement to adhere to their reciprocal obligations under the *Convention.* In *Hague Convention* cases Ontario courts can have confidence that whatever jurisdiction decides on a child's custody it will do so on the basis of the child's best interests. Ontario courts cannot always have the same confidence in s. 23 cases … Some non-signatory countries may do so; others may not.

[44] In *Ojeikere*, Laskin J.A. took a holistic approach to the determination of serious harm and concluded that, based on a combination of factors, the children were at risk. He considered: (i) the risk of physical harm; (ii) the risk of psychological harm; (iii) the views of the children; and (iv) the mother's claim that she would not return to the habitual residence even if the children were required to do so.

[45] Here, the application judge determined that Ontario could not exercise jurisdiction to make custody and access orders because she was not satisfied on a balance of probabilities that the children would suffer serious harm if returned to Kuwait. In coming to this conclusion, she discounted the children's evidence on

the basis that it was the product of the mother's inappropriate influence. She made this assessment in the face of uncontradicted evidence from three separate OCL experts that the children's views were in fact independent. She did not explain why this expert evidence should be rejected. This was an error.

[46] The right of children to participate in matters involving them is fundamental to family law proceedings. Canada has adopted the *Convention on the Rights of the Child*, effectively guaranteeing that their views will be heard. A determination of best interests – which is engaged in all child-related matters – must incorporate the child's view.

[47] The two older children (aged nine and five at the time of their arrival in Canada) were interviewed on numerous occasions to assist the court in ascertaining their views. The youngest child was also interviewed. In total, I. was interviewed on at least nine separate occasions: twice by an OCL caseworker who prepared a Voice of the Child Report, four times by an OCL clinical investigator, once by a psychologist, and at least twice by the Peel Children's Aid Society.

[48] The oldest child I. said he had been hit by his father with a belt. The belt had a buckle. He was also frequently threatened with the belt and with a hot iron. He was afraid when his father was angry and anxious because his grandfather knew, and yet the abuse continued. His mother was his protector, but she could not stop it. He witnessed the events of March 14, 2018. He said that his mother fell on the

couch and his father “tried to do something to her”. His grandmother and two uncles were there and tried to defend his mother. He saw his father grab his mother’s face. Fear of his father was the main reason for not wanting to return to Kuwait. His father’s violence was “like a nightmare”.

[49] A., then age four, was aware of the conflict between his parents. He said that his father grabbed his mother’s mouth and blood came out. He said he was scared and tried to get a key to leave. He said that if his mother was going to go back to Kuwait he would “lock the door so she can’t go”.

[50] The application judge did not address the children’s evidence about violence in the home, nor did she address their fear of the father. She reframed their evidence as a mere preference to remain in Canada and mentioned in passing I.’s asthma relief. She gave little weight to the children’s evidence because “they have been influenced by [their] mother”.

[51] Crucially, without explanation, the application judge rejected the uncontradicted expert evidence of Dr. Murphy, Mary Polgar, and Mahesh Prajapat supporting the independence of the children’s views. While it was open to her to reject the mother’s testimony and conclude that the mother may have tried to influence the children’s views, to reject the three experts’ evidence that the children’s views were actually independent and free from influence required

explanation. Absent any explanation as to why the application judge did not accept the three experts, her conclusion cannot stand.

[52] The clinicians who interviewed the children provided evidence that their views were independent.

[53] OCL clinician Mary Polgar testified that I. spoke with a clear, strong, and independent wish to remain in Canada. I. told her that no one told him what to say, that his feelings were his own.

[54] This was supported by child psychologist Dr. Murphy who said of I.:

> He was fairly consistent in what he had to say, both about his fear of his father … and his desire to stay in Canada … He talked about how hard it was when his father hit his mother.

[55] Dr. Murphy assessed I.'s ability to make independent judgments as an individual in his first assessment of March 2019. His assessment included factors consistent with those discussed in *A.C. v. Manitoba (Director of Child and Family Services),* 2009 SCC 30, [2009] 2 S.C.R. 181, at paras. 82, 84, 86, 87 and 88 about the weight to be given to a child's views. He met I. three times and assessed issues of influence and honesty, with reference to his past assessment of independence. In terms of assessing veracity, using clinical assessment tools, Dr. Murphy's conclusions continue to support that I. is honest, makes his own judgments, and is genuine in his accounts and his expressed fear of his father. Dr. Murphy also stated that, although on the surface I. presents as confident and

outgoing, he is suffering a significant level of anxiety due to the potential return to Kuwait. He also feels “some measure of responsibility to shield and/or comfort his younger siblings, all the while being in a state of fear”.

[56] The application judge said she could not put “much weight” on the children’s evidence because of the mother’s influence. In so concluding, she presumably relied on the father and his counsel’s bald assertion that the children had been coached as well as her negative assessment of the mother’s credibility. What she did not do was offer any explanation as to why she rejected the uncontested expert evidence. This evidence involved assessments of independence put forward by three separate experts who actually met with the children at different points in time over a long period and whose expertise was directly focused on the issue of whether the children’s views were their own. The experts said that they were.

[57] Judges are encouraged to probe and engage with expert evidence. They need not accept what an expert says simply because the witness is an expert. But to reject uncontroverted evidence of independence without any explanation for why she believed the experts were misled or wrong was an error.

[58] All of the *Ojeikere* factors are present here. There is a risk of physical and psychological harm, the children’s views are clear and – considering the new evidence including the “obedience order” – the mother cannot realistically return to Kuwait. She has been the primary caregiver since birth and the children would

likely lose their primary caregiver if forced to return to Kuwait. (The father's statement that he would not enforce the custody order or the obedience order offers little reassurance).

[59] On the evidence before this court, I am satisfied on the balance of probabilities that the children would suffer serious harm if returned to Kuwait. The Ontario court may exercise its jurisdiction to make custody and access orders for these children.

[60] I now turn to the issues raised with respect to the refugee claim.

(2) Effect of the refugee claim on the application

[61] The principle of non-refoulement[3] has been considered the cornerstone of international refugee protection. Canada has implemented the principle of non-refoulement in s. 115(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which provides:

> **115 (1)** 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.

[3]A principle that forbids a country from returning an asylum seeker to a country in which they would likely be in danger of persecution.

[62] Canada has ratified both the 1951 Refugee Convention and the *Protocol relating to the Status of Refugees*. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [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'".

[63] As submitted by CARL and UNHCR, the principle of non-refoulement applies not only to recognized refugees, but also to asylum seekers whose status has not yet been determined. Refugee protection is not limited to those granted refugee status but applies equally to asylum seekers.

[64] If, under the *CLRA*, a child is ordered returned to a place from which asylum is sought, the child's rights to asylum are lost. A person is not permitted to continue a refugee claim once in their home country. Nor is the person entitled to make a second claim should the person return to Canada: *Immigration and Refugee Protection Act*, at ss. 96 and 101(1)(c)).

[65] Further, art. 22 of the *Convention on the Rights of the Child* provides:

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention

> and in other international human rights or humanitarian instruments to which the said States are Parties.

[66] I adopt the reasoning of the High Court of Justice of England and Wales in *F.E. v. Y.E.*, [2017] EWHC 2165 (Fam), which held at para. 17:

> Approaching the matter from first principles I have no hesitation in concluding that where a grant of asylum has been made by the Home Secretary it is impossible for the court later to order a return of the subject child under the 1980 Hague Convention. Equally, it is impossible for a return order to be made while an asylum claim is pending. Such an order would place this country in direct breach of the principle of non-refoulement. It is impossible to conceive that the framers of the 1980 or 1996 Hague Conventions could have intended that orders of an interim procedural nature could be made thereunder in direct conflict with that key principle. [Emphasis added.]

[67] This same reasoning applies to a potential return order under s. 40(3) of the *CLRA*.

[68] Children are entitled to protection as they seek asylum. The application judge erred by ordering their return under s. 40(3) of the *CLRA* before the determination of the refugee claim.

[69] The OCL's submissions (and the mother's alternate submission) go further to suggest that the *entire application*, including the mother's request that Ontario exercise its jurisdiction to make custody and access orders for the children under s. 23 of the *CLRA*, should have been adjourned pending the refugee determination. I disagree for three reasons.

[70] First, it is the s. 40(3) return order that would engage the non-refoulement principles, not the s. 23 analysis. Section 40(3) empowers the court to make a return order in extra-provincial matters. The section reads:

> **40.** Upon application, a court,
>
> (a) that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Ontario; or
>
> (b) that may not exercise jurisdiction under section 22 or that has declined jurisdiction under section 25 or 42,
>
> may do any one or more of the following:
>
> 1. Make such interim order in respect of the custody or access as the court considers is in the best interests of the child.
>
> *2*. Stay the application subject to,
>
> > i. the condition that a party to the application promptly commence a similar proceeding before an extra-provincial tribunal, or
> >
> > ii. such other conditions as the court considers appropriate.
>
> 3. Order a party to return the child to such place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application.

[71] Section 40 confers broad powers on the court and unlike the terms of the *Hague Convention*, does not *require* a return of the child to his or her habitual residence absent engagement of the harm exception.

[72] A return order must not be made under s. 40(3) in the face of a pending refugee claim. This is consistent with the submissions of Amnesty, CARL, and the UNHCR, all of whom stressed that it was the execution of the removal order under s. 40(3) that extinguishes the refugee claim. (I would leave to another day how the court should proceed if a return order to a signatory country was sought under the *Convention* in the face of a pending refugee claim).

[73] Second, the OCL submits that the serious harm analysis in s. 23 should not proceed until the refugee determination is made because it is only after a positive refugee determination that the children would have the benefit of a rebuttable presumption of the risk of harm. In *A.M.R.I. v. K.E.R.*, 2011 ONCA 417, 106 O.R. (3d) 1, this court held that, in the *Hague Convention* context, refugee status gives rise to a rebuttable presumption of a grave risk of harm on return to the child's habitual residence. While *A.M.R.I*. concerned the *Hague Convention,* the rebuttable presumption would also apply in contemplating a return to a non-signatory country in the face of refugee status.

[74] It defies common sense to require children to await a refugee determination because the case for serious harm may get stronger. If the court is satisfied as to serious harm, it may exercise jurisdiction under s. 23 and proceed to make custody and access orders for the children even before the refugee determination.

[75] The OCL is concerned that in the face of a pending refugee claim a court might, as here, conclude that it is not satisfied as to serious harm under s. 23 and the rebuttable presumption would be lost. In other words, if the court is not satisfied that the child would, on the balance of probabilities, suffer serious harm as required by s. 23, the court would not exercise its jurisdiction. This, it is suggested, would render unavailable the rebuttable presumption of harm for the purposes of s. 23 articulated in *A.M.R.I*. when the child ultimately qualifies as a refugee. I do not share this concern.

[76] When the issue is potential harm to children, the courts must always be guided by the children's best interests. If a rebuttable presumption of harm arises from a refugee determination following an adverse s. 23 finding, the court would be required to revisit the s. 23 determination using the rebuttable presumption flowing from the child's new status as a refugee.

[77] Under s. 23, the court must be satisfied that the child would, *on the balance of probabilities*, suffer serious harm. When the child becomes a refugee, *A.M.R.I.* requires a fundamental shift in the court's approach by introducing a rebuttable presumption that the child would *with some certainty* suffer serious harm. Introducing a rebuttable presumption means the court must consider harm differently for the purpose of s. 23.

[78] When a request is made for the court to exercise jurisdiction under s. 23 in the face of a pending refugee claim, but the court is not satisfied that the serious harm requirement has been met, the court may want to consider exercising its power under s. 40(2) to stay the proceedings until the refugee claim is determined. However, even when the court concludes that the s. 23 test was not previously met, it will always be required to revisit the s. 23 analysis in light of the refugee determination and through the lens of the rebuttable presumption of harm. Most importantly, the return order under s. 40 could not be made before the refugee claim is resolved.

[79] Finally, the best interests of the child require that when the court is satisfied as to serious harm under s. 23, there be no further delay in making custody and access orders. This case demonstrates why. The new evidence describes that the children are anxious, exhibiting physical symptoms, and unsure of their immediate future. A delay is not in their best interests.

DISPOSITION

[80] I have concluded that the evidence establishes that the children would, on a balance of probabilities, suffer serious harm if returned to their habitual residence of Kuwait. Ontario therefore may and should exercise jurisdiction to determine custody and access. I have also concluded that it was an error to order the return of the children pending the determination of their refugee claim.

[81] I would therefore allow the appeal and order a custody and access hearing to proceed in the Superior Court of Justice as soon as possible. In accordance with the agreement between the parties, I would order the respondent father to pay the appellant mother costs fixed at $25,000 inclusive of HST and disbursements.

Released: MLB JULY 29 2020

M. L. Benotto J.A.

I agree Fairburn J.A.

I agree. Miller J.A.