Court File No.: C68182

COURT OF APPEAL FOR ONTARO

B E T W E E N:

D. E. M. E.-H.

Appellant

- and -

M. A. A.-B.

Respondent

- and -

THE OFFICE OF THE CHILDREN'S LAWYER

FACTUM OF THE INTERVENER, THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

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I. OVERVIEW

1. The relevant uncontested facts for the purposes of UNHCR's submissions are of three child asylum-seekers facing return to Kuwait but who are awaiting their decision from the Immigration and Refugee Board ('IRB') in accordance with the 1951 *Convention Relating to the Status of Refugees ('1951 Convention')*.[1] The basis of their claim was that they face a risk of abuse from their father.[2]

II. ISSUES AND THE LAW

2. UNHCR's mandate and responsibility to supervise the application of international conventions for the protection of refugees are set out in the Motion Record. UNHCR's submissions in this appeal are directed at the interaction between Article 33 of the *1951 Convention* and relevant provisions of the Ontario *Children's Law Reform Act* ('*CLRA*'). UNHCR's position is that the principle of *non-refoulement* applies to refugees, irrespective of whether they have been formally recognized as such. Where a claim for international protection has been made, a determination is required of whether a well-founded fear of persecution or a risk of serious harm exists before an asylum-seeker can be sent back to their country of origin. UNHCR submits that the *CLRA* must be read in light of these principles.

The Scope and Content of the Principle of *non-refoulement* under International Law

[1] *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS, vol. 189, p. 137.

[2] As the alleged agent of persecution is a non-state actor, *Canada v Ward*, 1991 1 SCR 12 requires the IRB to determine firstly, whether the Appellants' fear of persecution at the hands of the Respondent is well founded, and secondly, whether they can receive protection from their country of nationality, Jordan. If the IRB concludes that the Appellants are Convention Refugees this must be given appropriate weight based on this Court's decision in *A.M.R.I. v. K.E.R.*, 2011 ONCA 417. [*A.M.R.I.*]

3. The obligation of States not to "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened"[3] is the cornerstone of international refugee law, codified in Article 33(1) of the *1951 Convention*.[4] There are only two explicit exceptions to the application of the principle of *non-refoulement* stipulated in Article 33(2) of the *1951 Convention*.[5] However, neither is relevant for these submissions.

4. The principle of *non-refoulement* constitutes a binding and non-derogable component of international refugee protection, which has been codified in international and regional refugee law. It is a norm of customary international law,[6] and is consequently binding for all States, whether or not they are parties to the *1951 Convention* or its *1967 Protocol*. The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed by the Executive Committee of the High Commissioner's Programme ('ExCom') in numerous Conclusions.[7]

5. The prohibition of *refoulement* has also been codified in international human rights instruments, which preclude the removal of a person where there is a real risk of torture or other cruel, inhuman or degrading treatment or punishment or other forms of serious harm.[8] Under international human rights law, the principle of *non-refoulement* is, equally non-derogable and provides no exceptions: it is absolute and applies to all persons, including refugees and asylum-seekers.[9]

[3] Article 33(1) of the *1951 Convention*. Article 42(1) of the *1951 Convention* lists Article 33 as one of the provisions of the *1951 Convention* to which no reservations are permitted. See, UNHCR, *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, para. 4.

[4] The prohibition on *refoulement* applies not only with respect to return to the country of origin but also with regard to forcible removal to any other – third – country where a person has reason to fear persecution, serious human rights violations or other serious harm.

[5] Article 33 (2) of the *1951 Convention* foresees exceptions to the principle of *non-refoulement* where there are reasonable grounds for regarding a refugee as a danger to the security of the host country, or where a refugee, having been convicted of a particularly serious crimes, constitutes a danger to the community of that country.

[6] UNHCR, *Note on the Principle of Non-Refoulement*, November 1997; Lauterpacht & Bethlehem, "*The Scope and Content of the Principle of non-refoulement: Opinion*" in Feller, Türk and Nicholson, eds., *Refugee Protection in International Law*, Cambridge University Press, 2003) 87 at 163-164.

[7] ExCom Conclusions are adopted by consensus by the States which are Members of ExCom and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 106 States are Members of the Executive Committee, including Canada, which has been a member since 1957. See ExCom Conclusions No. 6, (c); No. 25, (b); No. 42 , (c), (d); No. 55 , para. (d); No. 65 , para. (c); No. 71 , para. (g); No. 74 , para. (g); No. 81 , para. (h); No. 82 , para. (d)(i); and No. 103, para. (m). UNHCR, Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme, October 2017.

[8] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UNTS, vol. 1465, p. 85, Art. 3. *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, vol. 999, p. 171, Art. 7; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, Art. 3.

[9] *Suresh*, 2002 SCC 1, at paras 75.

6. Canada has implemented the principle of *non-refoulement* in section 115(1) of the *Immigration and Refugee Protection Act* (*'IRPA'*).[10] Section 3(2)(b) of the *IRPA* specifically provides that the fulfillment of Canada's international obligations is an objective of the statute. The Supreme Court of Canada has affirmed that s. 115 of *IRPA* should be interpreted in a manner "which is consonant with the relevant international obligations" because it is the domestic implementation of the principle of *non-refoulement*.[11]

7. As addressed below, in *A.M.R.I.,* the Ontario Court of Appeal drew on the Supreme Court's decision in *Nemeth* which accepted that protection against *refoulement* under the *1951 Convention,* and the language "expel or return… in any manner whatsoever" was so broad that it must include return by means of extradition[12] to conclude that this language was equally applicable to the return of a child refugee under the *Hague Convention.*

The Principle of *Non-Refoulement* Applies to Asylum-Seekers

8. Given that a person is a refugee within the meaning of the *1951 Convention* as soon as he or she fulfils the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition but is recognized because he or she is a refugee. It follows that the principle of *non-refoulement*, applies not only to recognized refugees, but also to asylum-seekers whose status has not yet been determined.[13] In other words, formal recognition is declarative, rather than constitutive of refugee status and is merely *de jure* recognition of a pre-existing fact. This has been recognized by the Supreme Court, in *Nemeth*[14], and by the Federal Court.[15]

The Interpretation and Application of the *CLRA* in Light of the *1951 Convention*

[10] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. 3(1).
[11] *National Corn Growers Assn. v. Canada (Import Tribunal)* [1990] 2 S.C.R. 1324 at para. 74. *See also Pushpanathan v. Canada (MCI)*, [1998] 1 S.C.R. 982; *Nemeth v. Canada*, 2010 SCC 56 at para. 23.
[12] *Nemeth v Canada*, 2010 SCC 56, at para 33.
[13] UNHCR Handbook, para. 28; ExCom Conclusion, No. 6, para. (c), "Reaffirms the fundamental importance of the observance of the principle of *non-refoulement* […] of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees; see also ExCom Conclusion, No. 79, paras. (i)(j).
[14] *Nemeth v Canada*, 2010 SCC 56 at para 50: "Under the Refugee Convention, refugee status depends on the circumstances at the time the inquiry is made; it is not dependent on formal findings. As one author puts it, "it is one's de facto circumstances, not the official validation of those circumstances, that gives rise to Convention refugee status": James C. Hathaway, *The Rights of Refugees Under International Law* (2005), at pp. 158 and 278.
[15] See i.e. *Mileva v MEI*, 1991 FCJ 79 at paras 21-24.

9. The Ontario Court of Appeal in *A.M.R.I.* found that section 46 of the *CLRA* which implements the return provisions set out under the *Convention on the Civil Aspects of International Child Abduction* ("*Hague Convention*"), must be interpreted to conform with Canada's commitment to the principle of *non-refoulement* at international law.[16] UNHCR submits that the provisions of the *CLRA* which apply to this case must equally be read to conform to the *non-refoulement* principle and the *1951 Convention.*

10. As a principle of statutory interpretation, the Supreme Court held that "as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result."[17] There is a presumption that legislation is drafted to conform with international law,[18] and must be interpreted to reflect the principles of customary international law.[19] Canada's international obligations can inform the interpretation of domestic statutes even when they have not been implemented into domestic law.[20] Nothing in the *CLRA* purports to elevate the powers of that statute above the principle of *non-refoulement.* A proper interpretation of the *CLRA* allows the full respect and fulfillment of the principle of *non-refoulment* from the *1951 Convention,* and other international human rights instruments, and customary international law.

11. Affirming the presumption of conformity, the Supreme Court in *Nemeth* held the principle of *non-refoulement* as articulated in Article 33 of the *1951 Convention* should be read in directly to the *Extradition Act* itself.[21] Section 44 of the *Extradition Act* was thus understood as requiring the Minister to refuse surrender of a person to a risk of persecution.[22] By analogy to the extradition context described in *Nemeth,* this Court in *A.M.R.I.* recognized the application of Article 33 to the return of child refugees under the

[16] *A.M.R.I.* at paras 63-68. In A.M.R.I. the child had already been found to be a Convention Refugee whereas in Kovacs discussed below, the child was an asylum-seeker.
[17] *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292, at para 53.
[18] The presumption of conformity is rebuttable only by unambiguous legislative intent to default on an international obligation. *R v Hape*, at para 53. See also, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para 159. Customary rules of international law are automatically adopted into the common-law unless expressly by contrary legislation.
[19] *Canada (M.C.I.) v. Vavilov*, 2019 SCC 65 at paras 114, 182. This was recently affirmed by the Supreme Court in *Nevsun Resources Ltd.*, at para 94, holding that, "[t]here is no doubt then, that customary international law is also the law of Canada.".
[20] The unimplemented *Convention on the Rights of the Child* was relied on by the Supreme Court in *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4, [2004] SCR 76, to interpret the *Criminal Code*, and in *Kanthasamy v. Canada*, 2015 SCC 61, [2015] 3 SCR 909 to interpret *Immigration and Refugee Protection Act;* and *Baker v. Canada*, [1999] 2 SCR 817 in the course of assessing s. 114(2) of the *Immigration Act.*
[21] *Nemeth v Canada*, 2010 SCC 56 at paras 39, 96, 105, 114.
[22] *Ibid*, at para 105.

Hague Convention[23] and held that the *CLRA* must be read in conformity with Canada's international *non-refoulement* obligations. It follows, that the principle of *non-refoulement* should similarly apply to the removal of a child refugee outside the *Hague Convention* context under the *CLRA*, and that an Ontario court's power to order the return of a child under section 40 should be interpreted to give it effect.

12. Since asylum-seekers may be refugees, they are protected against *refoulement* by virtue of Article 33(1) of the *1951 Convention* and customary international law for the entire duration of the asylum proceedings.[24] The right to seek and enjoy asylum, as enshrined in Article 14 of the Universal Declaration of Human Rights and inherent in the proper functioning of the 1951 Convention, encompasses the obligation of States to provide fair and efficient procedures for the examination of applications for international refugee protection.[25] This includes an assessment of the asylum claim "within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs."[26] It follows, in the extradition context, that asylum proceedings must be conducted and a final determination on the asylum claim made, by the designated asylum authority, prior to the decision on the extradition request.[27] Building on this Court's analogy to extradition, Canada must not return a child asylum-seeker to his or her country of origin while his or her asylum application is being considered. This sequencing of decision flows from the operation of the *non-refoulement* principle, as the State examining the extradition request or similarly, a return request will need to clarify what international legal obligations it has vis-à-vis the person concerned prior to taking a decision which might be in breach of these obligations.[28]

[23] *A.M.R.I. v. K.E.R.*, 2011 ONCA 417 at paras 63-68.
[24] UNHCR, *Guidance Note On Extradition And International Refugee Protection*, ('Note on Extradition'), April 2008:, para. 31, "including at the appeal stage."
[25] The *1951 Convention* defines those to whom international protection is to be conferred and establishes key principles such as *non-refoulement*, but does not set out procedures for the determination of refugee status as such. It is generally recognised that fair and efficient procedures are an essential element in the full application of the *1951 Convention* outside the context of mass influx situations. See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, paras 4–5. See also ExCom Conclusion No. 81 (h); No. 82 (d)(iii); No. 85 (q); No. 99 (l). See also UNHCR, *Note On Extradition* para. 86.
[26] UNHCR Handbook, para. 190. See UNHCR, *Asylum Processes*, paras 48 and 50(e) and (i). See also ExCom Conclusions No. 8, para. (e)(iii); and No. 103, para q.
[27] UNHCR, *Note On Extradition*, paras 63 and 65.
[28] *Ibid*., para 64-67. See also, Sibylle Kapferer, *The Interface Between Extradition and Asylum*, November 2003, para 290-291.

13. The scope of Article 33(1) of the *1951 Convention* applies to any form of removal, and thus includes removal or return under the *CLRA*. In light of the above principles, UNHCR submits that a correct interpretation of Sections 23, 40, and 43 of the *CLRA* incorporates the principle of *non-refoulement*. Section 23 of the *CLRA* allows an Ontario court to exercise jurisdiction over the custody or access of a child physically present in Ontario if satisfied that the children would, on a *balance of probabilities*, suffer "serious harm" if they were removed from Ontario. Section 43 of the *CLRA* similarly provides that an Ontario court may supersede an extra-provincial order in respect of custody of or access to a child to prevent "serious harm".

14. In *Kovacs*,[29] the Court found that a child can be ordered returned under the *Hague Convention* while his or her asylum claim is pending and that the IRPA does not constitute a federal "stop sign" for provincial family law provisions. UNHCR does not believe that *Kovacs* was rightly decided. As stated above, *non-refoulement* obligations which attach to refugees are equally applicable to asylum-seekers pending a final determination. Moreover, in order to give full effect to its obligations under international refugee law, the State needs to provide for an examination of the merits of the claim by a central expert asylum authority. Furthermore, *Kovacs* is distinguishable because this is not a *Hague* case and there is no commitment to prioritizing children's best interests in custody matters in a non-signatory state.[30] UNHCR submits that the obligation of *non-refoulement* under Article 33(1) of the *1951 Convention* would be breached if an asylum-seeker is removed from Canada based on a decision regarding custody matters only, without a full review of the merits of the asylum claim. UNHCR submits that a proper risk assessment is to be undertaken by the specialized tribunal in Canada.[31] An assessment of "serious harm" pursuant to sections 23 and 43 of the *CLRA* do not meet those standards.

[29] *Kovacs v. Kovacs (The Attorney General for Ontario et al.,* [2002] O.J. No. 3074, 59 O.R. (3d) 671.
[30] *Geliedan v. Rawdah*, 2020 ONCA 254 at paras 37-38. "When considering whether to return a child to a non-signatory state, there is no basis to assume that the receiving state will determine custody and access issues based on the child's best interests." Ibid., para. 38. See further paras 34-38 for the rationale for the differences between applications under the *Hague Convention* and section 40 of the *CLRA*.
[31] See paragraph 13 and accompanying footnote. Furthermore, UNHCR endorses and adopts paragraphs 22-33 of the Factum of the intervener, Canadian Association of Refugee Lawyers, describing the unique expertise and role of the IRB and important principles and safeguards provided for under Canada's refugee determination system.

15. Having found that a risk of persecution falls within the scope of Article 13(b) of the *Hague Convention*, the Court in *A.M.R.I.* held that recognition as a Convention refugee creates a rebuttable presumption that the child's return would result in a "grave risk" of harm or exposure to an "intolerable situation" under Article 13(b).[32] In light of this Court's finding in *Ojeikere*,[33] that the standard of "serious harm" under s. 23 is analogous to, but "less stringent" than, the one set out by Article 13(b) of the *Hague Convention*, UNHCR submits that a risk of "serious harm" under ss. 23 and 43 clearly captures a risk of persecution. UNHCR submits that asylum-seekers should also benefit from this presumption given the application of the principle of *non-refoul*ement to asylum-seekers argued above.

16. The standard provided for by ss. 23 and 43 however place a higher burden on an asylum-seeker than is required in a refugee hearing proceeding and in international law. The standard of proof in an asylum claim under s. 96 of the *IRPA* is more than a mere possibility.[34] The Committee against Torture has described the standard for protection against *refoulement* under the Convention Against Torture as involving grounds that "go beyond mere theory or suspicion" but that "the risk does not have to meet the test of being highly probable."[35] Thus while ss. 23 and 43 would permit a court to take jurisdiction over custody to avoid persecution, they are not an adequate substitute for a proper risk assessment in compliance with Canada's *non-refoulement* commitments. The Court deciding the CLRA application in this case should have had the benefit of the determination by the IRB when determining the issues of risk faced by the asylum-seeker and where the person has been accepted as a Convention Refugee must apply the presumption of risk of persecution as required by this Court in *A.M.R.I.*

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th DAY OF JUNE 2020

Lorne Waldman, Charles Steven and Sumeya Mulla
Solicitors for the Intervener,
The United Nations High Commissioner for Refugees

[32] *A.M.R.I.* at paras. 52, 68.
[33] *Ojeikere v. Ojeikere*, 2018 ONCA 372 at para 58.
[34] *Adjei v MEI*, 1989 2 FC 680; Article 3 of the *CAT* also calls for a standard lower than that of proof on a balance of probabilities. See *AG Canada v Diab*, 2014 ONCA 374 at par 245
[35] See Nowak and McArthur, *Commentary* at 166-170, 181-193.

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