

REVISED VERSION

Changes have been made only to paragraph 21 reflecting UNHCR's oral submissions in this case

Court File No. C52822

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

A.M.R.I.

Applicant
(Respondent on Appeal)

- and -

K.E.R.

Respondent
(Appellant on Appeal)

**MEMORANDUM OF FACT AND LAW OF THE INTERVENER
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

Lorne Waldman

**LSUC # 18639E
Barrister & Solicitor
Waldman & Associates
281 Eglinton Ave. East
Toronto, Ontario
M4P 1L3**

**Tel.: 416-482-6501
Fax: 416-489-9618**

**Solicitor for the Intervener, the
United Nations High
Commissioner for Refugees**

TO:

WILSON CHRISTEN LLP

Per, Jeffery Wilson
137 Church Street
Toronto, Ontario
M5B 1Y5
Tel: (416) 360-5952
Fax: (416) 360-1350

Solicitor for the Respondent (Appellant on Appeal)

EPSTEIN COLE LLP

Per, Aaron Franks
390 University Avenue
Suite 2200
Toronto, Ontario
M5G 1E6
Tel: (416) 862-6225
Fax: (416) 862-2142

Solicitor for the Applicant (Respondent on Appeal)

ANGUS GRANT

Law Office of Catherine Bruce
250 the Esplanade, Suite 206
Tel: 416-483-4381
Fax: 416-483-9856

Solicitor for the intervener, the Canadian Council for Refugees

HEATHER NEUFELD

South Ottawa Community Legal Services
406-1355 Bank Street
Ottawa, ON K1H 8K7
Tel: 613-733-0140
Fax: 613-733-0401

Solicitor for the intervener, the Canadian Council for Refugees

JACQUELINE SWAISLAND

Waldman & Associates
281 Eglinton Avenue East
Toronto, Ontario M4P 1L3
Tel: 416-482-6501
Fax: 416-489-9618

Solicitor for the intervener, The Canadian Civil Liberties Association

THE HONOURABLE CHRIS BENTLEY

Attorney General of Ontario

Constitutional Law Branch

Per, Sean Hanley

8th Floor

720 Bay Street

Toronto, Ontario

M5G 2K1

Tel: 416-326-4128

Fax: 416 326-401

Solicitor for the intervener, the Attorney General of Ontario

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

A.M.R.I.

Applicant
(Respondent on Appeal)

- and -

K.E.R.

Respondent
(Appellant on Appeal)

INDEX

TAB		PAGE
1	Memorandum of Fact and Law of the Intervener, the United Nations High Commissioner for Refugees	1
A	Schedule “A” – List of Authorities	13
B	Schedule “B” – Relevant Provisions of Treaties and Statutes	16

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

A.M.R.I.

Applicant
(Respondent on Appeal)

- and -

K.E.R.

Respondent
(Appellant on Appeal)

**MEMORANDUM OF FACT AND LAW OF THE INTERVENER
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

I. THE FACTS

1. The relevant uncontested facts for the purposes of UNHCR's submissions are that a child who has been accepted as a refugee by the Immigration and Refugee Board (IRB) in accordance with the *1951 Convention Relating to the Status of Refugees* (1951 Convention) on the basis that her mother was abusing her¹, was subsequently returned to Mexico to the care of her mother through an order under the *Hague Convention on the Civil Aspects of International Child Abduction* (Hague Convention).² The child was not a party to the latter proceeding, nor given the opportunity to provide any testimony or evidence.³

II. ISSUES AND THE LAW

2. UNHCR's submissions in this appeal are directed at the appropriate interpretation and interaction of the 1951 Convention and the Hague Convention. In addressing the interaction, UNHCR's submissions will discuss the scope and content of the principle of *non-refoulement* as well as the prohibition of expulsion contained in the 1951 Convention, followed by an analysis of the appropriate interpretation of the Hague Convention in light of these obligations. In addition, UNHCR will address the application of the *Convention on the Rights of the Child* (CRC) to refugee children in this context.

¹ *Appellant's Appeal Book and Compendium, Affidavit of Josette Rosenzweig Espinal, Exhibit A, Tab 13, pp. 92-99.*

² *Appellant's Appeal Book and Compendium, Order and Endorsement, Tab 2, pp. 6-7* ["Order and Endorsement"]

³ *Order and Endorsement, ibid., at p.6.*

3. UNHCR's mandate and responsibility to supervise the application of international conventions for the protection of refugees has been explained in the Motion Record.

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

4. The principle of *non-refoulement* is a fundamental right and the cornerstone of international refugee protection.⁴ This principle is codified, inter alia, in Article 33(1) of the 1951 Convention:

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 of a particular social group or political opinion.⁵
5. The principle of *non-refoulement* is also codified in regional refugee law instruments;⁶ and forms a rule of customary international law.⁷
6. The principle of *non-refoulement* under the 1951 Convention is complemented by the *refoulement* prohibitions contained in and developed under international human rights law, prohibiting 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.⁸

⁴ UN High Commissioner for Refugees, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, December 2009, 1975 – 2009, at Conclusion Nos. 6, 17, 42, 68, 81, 103 [*Conclusions Adopted by the Executive Committee*]; UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997 [*UNHCR Note*].

⁵ *UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, GA Res. 429 (V) at Art. 33(1) [1951 Convention]*.

⁶ See: Organization of American States, *American Convention on Human Rights*, “Pact of San Jose”, Costa Rica, 22 November 1969 at Art. 22(8) [*ACHR*]; Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45 at art. II(3). *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, OAS Document OEA/Ser.L/V/II.66/doc.10, rev. 1, pp. 190-93..

⁷ *UNHCR Note, supra* note 4; UN High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09 at para. 4; Cambridge University Press, *Summary Conclusions: The Principle of Non-Refoulement*, June 2003 (Adopted at the expert roundtable organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, in the context of the Global Consultations on International Protection (University of Cambridge, UK, 9–10 July 2001) [*Summary Conclusions*]; Sir Elihu Lauterpacht & Daniel Bethlehem, “The Scope and Content of the Principle of non-refoulement: Opinion” in Erika Feller, Volker Türk and Frances Nicholson, eds., *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003) 87 at 163-164 [*Lauterpacht*].

⁸ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT]*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, GA Res. 39/46 at Art.

7. Canada has implemented the principle of *non-refoulement* in section 115(1) of the *Immigration and Refugee Protection Act* (IRPA).⁹ Section 3(2)(b) of IRPA specifically provides that the fulfillment of Canada's international obligations is an objective of the statute.¹⁰ According to this Court's jurisprudence, 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
8. Through the words "in any manner whatsoever" in Article 33(1) of the 1951 Convention the scope of the principle of *non-refoulement* applies to any act of removal, expulsion, deportation, return, extradition, rejection or non-admission etc. that would place a refugee at risk. The formal description of the act is not material.¹² Similarly, under international human rights law, the principle of *non-refoulement* applies to any person at risk of forcible transfer to a territory where they face a real risk of torture or cruel, inhuman or degrading treatment or punishment; or a threat to life, physical integrity or liberty.¹³
9. There are only two explicit exceptions to the application of the principle of *non-refoulement* stipulated in Article 33(2) of the 1951 Convention; however, neither is relevant for these submissions.¹⁴
10. Moreover, the exceptions in Article 33(2) of the 1951 Convention do not affect the host state's *non-refoulement* obligations under international human rights law.¹⁵ The prohibition of *refoulement* where there is a real risk of torture or other cruel, inhuman or degrading treatment, as referenced above, is,

3(1); UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, GA Res. 2200A (XXI) at Art. 7; *ACHR*, *supra* note 6 at art. 5(2); Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5 at Art. 3.

⁹ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 at S. 115(1) [IRPA].

¹⁰ IRPA, *ibid* at S. 3(2)(b).

¹¹ *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at para. 74. See also *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Nemeth v. Canada*, 2010 SCC 56 at para. 23.

¹² *Lauterpacht*, *supra* note 7 at 112; UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007 [Advisory Opinion].

¹³ *Lauterpacht*, *ibid* at 122 - 123.

¹⁴ Article 33(2) provides: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

¹⁵ *Lauterpacht*, *ibid* at 137 - 138; *Advisory Opinion*, *supra* note 12 at paras. 17-20.

unlike Article 33, non-derogable and provides no exceptions and thus is absolute, applying to all persons, including refugees.¹⁶

The Prohibition of Expulsion under Article 32 of the 1951 Convention

11. As this appeal involves a child recognized as a refugee in Canada, the child is lawfully present in Canada thus engaging Article 32 of the 1951 Convention, which provides:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.¹⁷

12. Article 32 and 33 are closely linked and supplement each other. The protections afforded by Article 32 are similar to Article 33 but not identical. A primary difference between the two provisions is their scope: Article 32 only applies to persons lawfully present in the country of refuge; whereas Article 33 applies to any person present in the territory. Persons who are lawfully present include those who have been recognized by that country as a refugee.

13. Like Article 33(2), Article 32 stipulates only two permissible reasons for which expulsion of a recognized refugee could be justified, namely reasons of national security or public order. Neither of these reasons are relevant for these submissions, nonetheless they emphasize that any exceptions are to be interpreted and applied restrictively given the serious consequences of expulsion on the life and freedom of the refugee.¹⁸

14. In addition to the substantive limitations, Article 32 poses a number of procedural limitations. It requires that the expulsion “of such a refugee shall be only in pursuance of a decision reached in accordance with

¹⁶ *Lauterpacht, ibid* at para. 20; *Soering v. United Kingdom* (1989), 11 EHRR 489 at para 88; *Chahal v. United Kingdom* (1997) 23 EHRR 413 at para. 74.

¹⁷ *1951 Convention, supra* note 5 at Art. 32.

¹⁸ *Conclusions Adopted by the Executive Committee, supra* note 4 at Conclusion No. 7.

due process of law.” Furthermore, except where there are compelling reasons of national security, the refugee shall be allowed to submit evidence to clear herself or himself, and to appeal to and be represented for the purpose before the competent authority. The contracting state shall also allow the refugee to have a reasonable period within which to seek legal admission to another country.¹⁹

15. Thus, under the scheme in the 1951 Convention, the only legitimate means for removal of a recognized refugee are contained in Articles 32 and 33(2), neither of which is relevant for these submissions. The only other means for removing a refugee would be to cease their status in accordance with Article 1C or to cancel it. Under international human rights law where the prohibition on return to torture or cruel, inhuman or degrading treatment or punishment is absolute, there are no means to return a child in such circumstances.

The interpretation and application of the Hague Convention in light of the 1951 Convention

16. The interaction between the two Conventions should be guided by the principle of treaty interpretation set out in the *Vienna Convention on the Law of Treaties* (Vienna Convention), parts of which are generally accepted as reflecting customary international law. Canada acceded to the Vienna Convention in 1970. Relevant to this case are Articles 31(1) and 31 (3)(c), which provide that a treaty shall be interpreted in good faith in light of its context and purpose,²⁰ and that relevant rules of international law in force at the time of entry of force must be considered in a treaty’s interpretation.²¹
17. UNHCR submits that the two Conventions are not in conflict and that in light of the above mentioned principles the proper interpretation of the Hague Convention is one which allows the full respect and fulfillment of the principle of *non-refoulement* and the prohibition of expulsion found in the 1951 Convention and other relevant international law instruments.
18. The scope of Articles 32 and 33(1) of the 1951 Convention is that they apply to any form of removal, and thus includes removal under the Hague Convention. In order to interpret the two Conventions in harmony,

¹⁹ *1951 Convention*, *supra* note 5 at Art. 32.

²⁰ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 at Art. 31(1) [*Vienna Convention*].

²¹ *Vienna Convention*, *ibid.* at Art. 31(3)(c).

UNHCR submits that the correct interpretation of Articles 12, 13(b) and 20 of the Hague Convention is one which incorporates the principle of *non-refoulement* and the prohibition of expulsion as contained in the 1951 Convention. Article 13(b) allows a state to refuse to return a child, who would ordinarily or otherwise be returnable under Article 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.”²² Article 20 further provides that “[t]he 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.”²³ “[F]undamental principles” and “the protection of human rights and fundamental freedoms” must be interpreted to include the principle of *non-refoulement*, as found in the 1951 Convention, in international human rights law, and as reflected in customary international law.²⁴

19. The harmonious interpretation of the two Conventions is supported by the Vienna Convention principles of treaty interpretation. The 1951 Convention came into force in 1954. The Hague Convention came into force in 1983. Thus, as Article 31 (3)(c) of the Vienna Convention stipulates the interpretation of the Hague Convention must take into account the 1951 Convention, as a relevant rule of international law already in force at the time of drafting and entry into force.
20. The above interpretation is consistent with the objectives and purposes of both the 1951 Convention and the Hague Convention. In determining the objective and purposes the preamble of a treaty is particularly instructive.²⁵ The preamble of the Hague Convention focuses on the best interests of the child – “firmly convinced that the interests of children are of paramount importance in matters relating to their custody.”

²² Hague Conference on Private International Law, *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Hague XXVIII at Art. 13(b) [*Hague Convention*].

²³ *Hague*, *ibid* at Art. 20.

²⁴ UN High Commissioner for Refugees, *Non-Refoulement*, 12 October 1977, No. 6 (XXVIII) – 1977, GA Doc. No. 12A (A/32/12/Add.1) [*Non-Refoulement*].

²⁵ Vienna Convention, *supra* note 20 at Article 31(2).

The preamble further identifies as an object and purpose of the Hague Convention the “desir[e] to protect children internationally from the *harmful* effects of their wrongful removal.”²⁶

21. In accordance with Article 13 of the Hague Convention, the return of the refugee child may be refused if the Court hearing the Hague Application is satisfied the return would expose the child to a "grave risk to physical or psychological harm or otherwise place the child in an intolerable situation." This provision must be interpreted in a harmonious fashion consistent with international refugee and human rights law, per Article 20 in conjunction with Article 12. Thus the child's recognition as a refugee must be accepted as prima facie proof that there is a grave risk that a return to the country of origin would expose the child to type of harm contemplated in Article 13(b) of the Hague Convention. This would be the case in particular where a trier of fact had already determined the child to be credible and found that the child possessed a well-founded fear of persecution. Thus, significant weight must be given to such determinations made by the competent Canadian authority, i.e., the IRB, creating a rebuttable presumption of the existence of a grave risk of physical or psychological harm or an intolerable situation. At a minimum, a full risk assessment must be undertaken within a fair and efficient procedure with adequate procedural safeguards and a right to an effective remedy. This includes the right to an individual assessment, the right to know the case against you, the right to be heard, and the right to representation.
22. This interpretation is also consistent with the limited jurisprudence assessing the relationship between the two Conventions. A decision of the Ontario Provincial Court, *Martinez v. Martinez-Jarquin*,²⁷ acknowledged that a crucial issue in an analysis under the Hague Convention is a risk of harm to the children in question upon their return. In this regard the Court held that, “the findings of that Tribunal [Immigration and Refugee Board] must be given significant weight when considering the issues before this Court. It is preferable that any decision of this Court should not be seen to be in contradiction of the

²⁶ *Hague Convention*, *supra* note 22 at preamble.

findings of the Immigration Board.”²⁸ The Court went on to assess the harm to the children in light of all the evidence and concluded that the “Respondent has failed to demonstrate, on the balance of probability, that the children would suffer serious harm if returned to El Salvador.”²⁹ The need to consider a suggestion of a risk of persecution to the child upon return was also expressed in a case before the UK Court of Appeal, *Re S*.³⁰

23. The above interpretation is also supported by and consistent with international jurisprudence and opinion in interpreting the interaction between *non-refoulement* and extradition treaties. The Executive Committee has held that *non-refoulement* extends to extradition.³¹ In addition, jurisprudence from different jurisdictions shows that the principle has been read into extradition legislation. States have taken different views on whether one’s status as a refugee results in an automatic barrier to extradition, or whether it creates a *prima facie* entitlement to protection that can be rebutted by evidence showing a risk no longer exists.³² Nevertheless regardless of differences in approach, the jurisprudence is consistent in showing that States have held that the principle of *non-refoulement* is applicable to extradition. It follows, that the principle should similarly be applicable to the removal of a refugee under the Hague Convention, and that Article 13(b) and 20 should be interpreted to give effect to this principle.

The Convention on the Rights of the Child

24. The above interpretation of the interaction between the two Conventions is further supported by an application of the provisions in the CRC. The CRC provides a comprehensive framework for the responsibilities of its States Parties to all children within their jurisdiction. The CRC is thus engaged in

²⁸ *Martinez v. Martinez-Jarquin*, [1990] O.J. No. 1385 (previously indexed as *S.M v. G.M.*) (QL) [*Martinez*].

²⁹ *Martinez, ibid.*

³⁰ *Re S (Children) (Abduction: Asylum Appeal)*, [2002] EWCA Civ 843 [*Re S*]. Laws LJ stated, for example, 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.’ (para. 25)

³¹ *Conclusions Adopted by the Executive Committee, supra* note 4, at Conclusion No. 17.

³² See: *Fernandez v. Government of Singapore*, [1971] 1 WLR 987; *Bereciartua-Echarri*, No. 85.234, *Recueil Lebon*, (1 Apr. 1988); *Schweizerische Bundesgericht*, Ref. 1A. 127/1990/tg, 18 Dec. 1990, abstract at (1993), 5 *Int’l J. Refugee Law*, at 271; *Nemeth, supra* at paras. 97-111, 114. See Also: Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007) 257-262.

any determination of legal rights affecting children and its provisions should guide the interpretation of any treaty affecting children's rights.³³ In this regard, the interpretation of the 1951 Convention and the Hague Convention should be guided by the provisions of the CRC. Using the CRC to inform the interpretation of treaties involving children's rights is also in line with the approach of Canadian Courts which have frequently used the Convention as an aid to statutory interpretation.³⁴

25. While the CRC is not a refugee specific instrument, it stipulates that state parties must take measures to protect refugee children in accordance with the provisions in the CRC and other applicable international law instruments.

26. A starting point for the application of the CRC in this analysis is Article 22 which statutorily mandates that children recognized as refugees enjoy the rights set forth in the Convention:

States parties shall take appropriate measures to ensure that a child 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.³⁵

27. Although the rights in the CRC cover almost every aspect of a child's life, the rights of particular relevance to this appeal are the best interests of the children and the child's right to express his or her views freely.

Best Interests of the Child

28. Article 3 of the CRC provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best

³³ UN High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care*, 1994 at Chapter 2 [Guidelines 1994].

³⁴ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436; *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1341; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519; *United States v. Burns*, [2001] 1 S.C.R. 283; *Louie v. Lastman* (2001), 208 D.L.R. (4th) 380 (ON C.A.); *A.P. v. L.D.*, [2001] R.J.Q. 16 (C.A.); *C.U. v. McGonigle* (2003), 223 D.L.R. (4th) 662 (AB C.A.); *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, 2004 SCC 4; and, *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

³⁵ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, GA Res. 44/25 at Art. 22 [CRC].

interests of the child shall be a primary consideration.”³⁶ The best interests of the children must therefore be assessed in every proceeding involving children.

29. The importance of using this approach in determinations regarding refugee children has been recognized by the Executive Committee³⁷ stressing that all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity.³⁸ In addition, a determination of the best interests of a child must take into account domestic law, international humanitarian law, refugee law and other child-related instruments, thus ensuring proper recognition of the rights of refugee children and the concerns they face.³⁹
30. The CRC recognizes that in some circumstances the best interest of a child may include separation from a parent. According to Article 9

a child shall not be separated from his or her parents against their will, except when [such separation] is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.⁴⁰

31. The fact that proper weight and consideration must be given to a child’s status as a refugee has been recognized by the Committee on the Rights of the Child

... family reunification in the country of origin is not in the best interest of the child and should therefore not be pursued where there is a ‘reasonable risk’ that such a return would lead to a violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of non-refoulement obligations. Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein.⁴¹

³⁶ *CRC, ibid* at Art. 3.

³⁷ *Conclusions Adopted by the Executive Committee, supra* note 4 at No. 47

³⁸ *Conclusions Adopted by the Executive Committee, ibid* at No. 98; UN High Commissioner for Refugees, *Conclusion on Protection from Sexual Abuse and Exploitation*, 10 October 2003, No. 98 (LIV) – 2003, A/AC.96/987 also states that the best interest of the child shall be a primary consideration in the design and implementation of all prevention and response measures, to ensure the protection of children from all forms of abuse, neglect, exploitation and violence, including sexual abuse and exploitation.

³⁹ UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008 [*Guidelines 2008*].

⁴⁰ *CRC, supra* note 35 at Art. 9.

⁴¹ UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6 at para. 82

The risk of return envisioned in the above comment is even stronger when the very basis of the refugee recognition is abuse or neglect of the child by the parent making the application.

32. Thus, an analysis of the best interests of the child in applications under the Hague Convention in respect of a refugee child requires that the judge consider a child's status as a refugee or any alleged risks of persecution or other serious harm. As observed by the UK Court of Appeal in *Re S*,

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.⁴²

33. UNHCR thus submits that the best interest of the child's analysis must be a fundamental component of the determination of an application under the Hague Convention. In this analysis the Judge must consider a child's status as a refugee, especially when that status was acquired based on the abuse and neglect the child faced back home. The best interests of the child dictates that the child's best interest is protection from persecution and not to be re-united with her or his family if this would place him or her at risk of persecution.

The Child's Right to Express his or her View

34. The CRC also provides specific procedural rights that must be afforded to a child upon determination of their rights. According to Article 12 of the CRC, the views of the child must be given "due weight" in accordance with the age and maturity of the child.⁴³ States parties have an obligation to recognize this right and ensure its implementation by listening to the views of the child and according them due weight. It is also important to bear in mind that a flexible attitude to age must be taken into account. Also, relevant cultural factors must be considered. While Article 12 does not define "maturity" it implies the child's ability to comprehend and assess the implications of various options.⁴⁴

35. According to the United Nations Committee on the Rights of the Child,

⁴² *Re S*, *supra* note 30 at para 25.

⁴³ *CRC*, *supra* note 35 at Art. 12.

⁴⁴ *Guidelines 2008*, *supra* note 39.

Article 12 of the CRC applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies.⁴⁵

36. The child's right to be heard imposes an obligation on states to introduce legislative measures requiring decision makers in judicial or administrative proceedings to provide children with access to appropriate information and adequate support.⁴⁶
37. Articles 3 and 12 of the CRC should be viewed as complementary provisions. Article 3 establishes the objective of achieving the best interests of the child and Article 12 implements a way to reach the goal of hearing the child.⁴⁷
38. UNHCR thus submits that according to Article 12 CRC a refugee child must have the opportunity to be heard and to express his/her views regarding the determination of an application under the Hague Convention. The determination of the application under the Hague Convention has a profound effect on the child, and in order to ensure that the application is properly decided accounting for the best interests of the children, the child's views are of paramount importance.

III. ORDER REQUESTED

39. UNHCR respectfully requests that the Court apply the legal standards set out above when deciding the merits of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF MARCH 2011

Lorne Waldman,
Solicitor for the Intervener,
the United Nations High Commissioner for Refugees
LSUC # 18639E

⁴⁵ UN Committee on the Rights of the Child (CRC), *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12 at para. 32 [*Gen. Com. 12*].

⁴⁶ *Gen. Com. 12, ibid* at para. 33

⁴⁷ *Gen. Com. 12, ibid* at para. 33.

Schedule “A”

List of Authorities

JURISPRUDENCE

1. *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30.
2. *A.P. v. L.D.*, [2001] R.J.Q. 16 (C.A.).
3. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
4. *Bereciartua-Echarri, No. 85.234, Recueil Lebon*, (1 Apr. 1988).
5. *C.U. v. McGonigle* (2003), 223 D.L.R. (4th) 662 (AB C.A.).
6. *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, 2004 SCC 4.
7. *Chahal v. United Kingdom* (1997) 23 EHRR 413.
8. *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436.
9. *Fernandez v. Government of Singapore*, [1971] 1 WLR 987.
10. *Louie v. Lastman* (2001), 208 D.L.R. (4th) 380 (ON C.A.).
11. *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1341.
12. *Martinez v. Martinez-Jarquín*, [1990] O.J. No. 1385 (previously indexed as *S.M. v. G.M.*) (QL).
13. *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.
14. *Nemeth v. Canada*, 2010 SCC 56.
15. *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.
16. *Re S (Children) (Abduction: Asylum Appeal)*, [2002] EWCA Civ 843.
17. *Schweizerische Bundesgericht, Ref. IA. 127/1990/tg*, 18 Dec. 1990, abstract at (1993), 5 Int’l J. Refugee Law at 271.
18. *Soering v. United Kingdom* (1989), 11 EHRR 489.
19. *United States v. Burns*, [2001] 1 S.C.R. 283.
20. *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519.

ADDITIONAL SOURCES

1. Cambridge University Press, *Summary Conclusions: The Principle of Non-Refoulement*, June 2003 (Adopted at the expert roundtable organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, in the context of the Global Consultations on International Protection (University of Cambridge, UK, 9–10 July 2001).
2. *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, OAS Document OEA/Ser.L/V/II.66/doc.10, rev. 1, pp. 190-93.
3. Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007).
4. J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005).
5. P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (Cambridge: Cambridge University Press, 1995).
6. Sir Elihu Lauterpacht & Daniel Bethlehem, “The Scope and Content of the Principle of non-refoulement: Opinion” in Erika Feller, Volker Türk and Frances Nicholson, eds., *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003) 87.
7. UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.
8. UN Committee on the Rights of the Child (CRC), *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12.
9. UN General Assembly, *1967 Declaration on Territorial Asylum*, Resolution 2132 (XXII), 14 December 1967.
10. UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007.
11. UN High Commissioner for Refugees, *Conclusion on Protection from Sexual Abuse and Exploitation*, 10 October 2003, No. 98 (LIV) – 2003, UN Doc. A/AC.96/987.
12. UN High Commissioner for Refugees, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, December 2009, 1975 – 2009.
13. UN High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09.

14. UN High Commissioner for Refugees, *Non-Refoulement*, 12 October 1977, No. 6 (XXVIII) – 1977, GA Doc. No. 12A (A/32/12/Add.1).
15. UN High Commissioner for Refugees, *Note on Expulsion of Refugees*, 24 August 1977, Doc. No. EC/SCP/3.
16. UN High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care*, 1994.
17. UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008.
18. UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997.

Schedule "B"
Relevant Provisions of Treaties and Statutes

1. *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969 at Arts. 5(2) and 22(8).
2. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, GA Res. 39/46 at Art. 3(1).
3. *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, GA Res. 44/25 at Arts. 3, 9, 12 and 22.
4. *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45 at Art. 2(3).
5. *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, GA Res. 429 (V) at Preamble, Arts. 32, 33 and 42(1).
6. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5 at Art. 3.
7. *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Hague XXVIII at Preamble, Arts. 13(b) and 20.
8. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 at ss. 3(2)(b), 115(1).
9. *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, GA Res. 2200A (XXI) at Art. 7.
10. *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 at Arts. 31(1), 31(3)(c).

American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969 at Arts. 5(2) and 22(8).

Article 5. Right to Humane Treatment

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

Article 22. Freedom of Movement and Residence

8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, GA Res. 39/46 at Art. 3(1).

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, GA Res. 44/25 at Arts. 3, 9, 12 and 22.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a

particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 22

1. 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.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or nongovernmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the

family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

***Convention Governing the Specific Aspects of Refugee Problems in Africa*), 10 September 1969, 1001 U.N.T.S. 45 at Art. 2(3).**

Article 2 - Asylum

(...)

3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, GA Res. 429 (V) at Preamble, Arts. 32, 33 and 42(1).

Preamble

(...)

considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

(...)

Article 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33

Prohibition of Expulsion or Return (“refoulement”)

1. 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 of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the

country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 42(1)

Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5 at Art. 3.

Article 3 - Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Hague XXVIII at Preamble, Arts. 13(b) and 20.

Preamble

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 –

Article 13

Notwithstanding 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 –

(...)

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 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.

Immigration and Refugee Protection Act, S.C. 2001, c. 27 at ss. 3(2)(b), 115(1).

Objectives- Refugees

3. (2) The objectives of this Act with respect to refugees are
(...)

(b) to fulfill Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

Principle of Non-refoulementProtection

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.

International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, GA Res. 2200A (XXI) at Art. 7.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 at Arts. 31(1), 31(3)(c).

Article 31 - General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

3. There shall be taken into account, together with the context:

(...)

(c) any relevant rules of international law applicable in the relations between the parties.

A.M.R.I

Applicant (Respondent on Appeal)

-and-

K.E.R

Respondent (Appellant)

Court File No. C52822

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

**MEMORANDUM OF FACT AND LAW OF THE
INTERVENER,
THE UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES**

Lorne Waldman

LSUC # 18639E

Barrister & Solicitor

Waldman & Associates

281 Eglinton Ave. E.

Toronto, Ontario

M4P 1L3

Tel.: 416-482-6501

Fax: 416-489-9618

Solicitor for the Intervener,

the United Nations High Commissioner for Refugees