CITATION: Sabeahat v. Sabihat, 2020 ONSC 2784
COURT FILE NO.: FS-18-0099-00
DATE: 2020 05 07

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
YEHYA SABEAHAT,	)	
	)	
Applicant	)	*Barry Nussbaum* and *Morgan Copeman*, for the Applicant
	)	
- and -	)	
	)	
	)	
RAYA NATALY SABIHAT,	)	
	)	
Respondent	)	*Frances M. Wood,* for the Respondent
	)	
	)	
	)	*Patric Senson*, for the Office of the Children's Lawyer
	)	
	)	
	)	**HEARD:** July 8, 9, 10, 11; September 10, 11, 12; November 13 and 14; and December 12, 2019 at Brampton, Ontario

REASONS FOR DECISION

Emery J.

[1] It stands to reason that where the parties to a family breakdown live in different countries, the rights of those parties can involve the law between nations. The rights of the parties in this case do just that.

[2] There is a treaty between signatory nations known as the *Hague Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention*"). This treaty provides the legal framework for one parent in a signatory country to seek the return of a child who has been wrongfully removed to, or retained in another signatory state. Canada and Israel have each signed the *Hague Convention*, and therefore have reciprocal treaty obligations.

[3] This application is brought by a father, Yehya Sabeahat, under the *Hague Convention* for the immediate return of three children that he claims were wrongfully removed. The mother, Raya Nataly Sabihat, removed the children from Israel when she moved them to Canada in July 2017. She has refused to return the children to Israel based on her belief that they would suffer serious harm there.

[4] Applications under the *Hague Convention* are intended to be summary in nature. They are generally based on affidavit evidence to provide the evidentiary record necessary for the court in the requested State, in this case Canada, to provide a ruling as expeditiously as possible.

[5] This application was anything but general. The case took ten days to hear. It was fraught with emotion, high conflict, and cultural sensitivities from the outset, starting with mutual challenges to affidavits filed by the parties. Each of them brought motions to strike all or parts of the affidavit filed by the other side. Both motions were granted in part, and orders were made to screen out sections of certain affidavits that offended the *Family Law Rules* or the law of evidence.

[6] The parties gave *viva voce* evidence at the hearing to supplement the affidavits filed, and on cross-examination. The father participated by videoconference on each day of the hearing from Israel, and from Germany on at least one other occasion. Translators were required in court to translate questions and evidence between English and the Hebrew and Arabic languages for particular witnesses. There were technical issues with the video platform, and the disorganization of affidavit material that had been sent to the father beforehand interfered with the ability of counsel to conduct a fair and organized hearing. This combination of unfortunate events only compounded a difficult situation, adding more time to the hearing.

[7] Upon reading the several affidavits filed, receiving the evidence of the witnesses called, and hearing submissions of counsel for the parties and the Office

of The Children's Lawyer ("OCL"), I dismissed the application on December 21, 2019, for reasons to follow. These are those reasons.

Overview

[8] The father and the mother, Raya Nataly Sabihat, are the parents of three children: M, born on November 10, 2010 and now age 9, and the twins, R and A, who were born on January 13, 2012 and who are currently 8 years old. The children were all born in Israel.

[9] The father has brought this application under the *Hague Convention* for the mother to return the children to Israel. He bases the application on facts to support his contention that the children were habitually resident in Israel where he had custody rights. He takes the position that they were removed by the mother without his consent. As the children were wrongfully removed under Article 3 of the *Hague Convention*, the father requires this court to order that they be returned to Israel as a matter of law under Article 12. The father takes the position that the court in Israel has the appropriate jurisdiction to decide the parenting issues between the parties.

[10] The mother actually removed the children twice from Israel, the first time on June 23, 2017, and the final time on July 27, 2017. She and the children, along

with her parents Aidah Sabihat and Salim Sabihat (respectively, the “grandmother” and “grandfather”) now reside in Mississauga, Ontario.

[11] The mother has conceded certain facts that make it unnecessary for the court to make findings on issues that are often contested in cases brought under the *Hague Convention*. The following facts are not in dispute:

a) Article 3 requires a finding that the removal of children breached the custody rights of the other parent under the law of the country in which the children were habitually resident to be wrongful. What it means to be habitually resident, and any factual dispute about where the children were last habitually resident, has been resolved by the mother’s concession that all three children were habitually resident in Israel at the time of their removal.

b) Article 3 also requires findings that the parent applying for return of the children had custody rights and was exercising those custody rights at the time of removal. These rights include an entitlement to custody, and do not require that a parent’s right of custody, or access to a child has been recognized in a court order. The mother agrees that the father had a right of custody over the children at the time of removal, and that he was exercising that right.

c) Article 12 provides that the court shall order the return of a child who has been wrongfully removed under Article 3, even where an application has been commenced after one year, unless it is demonstrated that the child has now settled in his or her new environment. The father commenced this application in the (Ontario) Superior Court of Justice on April 20, 2018, well within one year following the removal of the children. Therefore, it is not open for this court to consider evidence about whether the children have settled in Ontario.

d) The court hearing the application may exercise its discretion and refuse to order the return of the child under Article 13 if two conditions are satisfied: if the child objects, and that child has attained the age and degree of maturity at which it is appropriate to take his or her views into account. In this case, the mother concedes that none of the three children meet these conditions.

[12] Instead, the application is opposed on the basis that the facts of this case qualify under one, if not both exceptions to making an order under Article 12. These exceptions are provided by Article 13 and Article 20 of the *Hague Convention* itself. In particular, Article 13 (b) provides that:

> **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.

[13] The second exception is found under Article 20, which permits the court limited discretion to refuse the making of an order for the return of a child:

> **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.

[14] As all criteria the father relies upon has been conceded, the *Hague Convention* requires the court to order that the children in this case be returned to Israel unless it is found, on the evidence and the law, that either Article 13 or Article 20 applies. The grounds for the mother to oppose the application will therefore turn on the following issues:

a) Under Article 13 (b), there is a grave risk that the return of the three children to Israel would expose them to physical or psychological harm, or otherwise place those children in an intolerable situation; or

b) Under Article 20, there is a proper basis for the court to exercise its discretion and refuse to order the return of the three children to Israel if this would not be permitted by the fundamental principles held by Canada relating to the protection of human rights and fundamental freedoms.

Chronology and Legal Proceedings

[15] The parties married on October 9, 2009 in Israel. It is common ground that they separated on June 23, 2017. It was on that date that the mother first removed the children by taking them to Canada without the father's knowledge or consent.

[16] A day or two after the mother arrived in Canada with the children, her brother Amir travelled to Canada to persuade her to return to Israel and to reconcile with the father. The grandfather followed shortly thereafter, and together the grandfather and Amir managed to convince the mother to return with the children to Israel.

[17] Upon arriving back in Israel on July 5, 2017, the children went to stay with the father and their passports were delivered to him. The mother stayed with her parents at their home in the coastal city of Haifa.

Legal proceedings in Israel

[18] The parties are both Palestinian Arab citizens of Israel and follow the Muslim faith. This is relevant to the narrative because orders were obtained by the parties from two courts available to Muslim families in Israel. There is the Israeli Family Court which hears most family law applications. There is also the Sharia Court, which applies Sharia law.

[19] The mother commenced divorce proceedings in the Sharia Court in July 2017. She applied for custody of the three children in the Israeli Family Court, believing at the time that she would be staying in Israel.

[20] On July 23, 2017, the mother obtained an order of protection (the "Protection Order") from the Israeli Family Court. The mother was aware that the father had enrolled the children in a day camp the same week. She had not seen the children since July 5, 2017. Believing that the Protection Order would shield her from harm, she picked up the children from the day camp on July 24, 2017 and took them to the grandparent's home in Haifa.

[21] In the early morning hours of July 25, 2017, a grenade exploded outside the house of the grandparents. The mother and her parents reported this attack to the police in the Department of Justice, Haifa District the next day.

[22] On July 27, 2017, the mother and the three children, along with their grandparents, departed from Israel to settle in Canada.

[23] Soon after the mother and children departed Israel for the final time, the father commenced a guardianship proceeding in the Sharia Court. The Sharia Court issued the following court orders on the corresponding dates:

a) Temporary guardianship over all three children to the father, and an order authorizing the father to serve the mother by publishing notice of the custody proceeding in a local newspaper on October 29, 2017;

b) An order extinguishing the mother's right to custody of the three children, and that they be removed from her and delivered to the father on October 30, 2017; and

c) An order appointing the father permanent Sharia legal guardian of the three children on February 6, 2018.

[24] On December 11, 2017, a divorce order was made in the divorce proceeding the mother had initiated in the Sharia Court. The mother emailed documents to finalize the divorce to the local Shaikh, the religious leader in Haifa who had made known to the grandfather through WhatsApp what documents he

required. The mother sent the Shaikh these documents using her own email address.

[25] After the mother fled to Canada, she took no further steps in the proceedings before the Sharia Court except to obtain the divorce.

Hague Convention proceedings in Ontario

[26] On December 22, 2017, the father made a complaint to the Canadian Embassy in Israel that the children had been kidnapped by the mother and gave notice he would be taking steps under the *Hague Convention* for their return. On April 20, 2018, the father commenced this application at Brampton, Ontario.

[27] The father obtained an order from this court on September 11, 2018 for substituted service to serve the mother at the home of her parents in Mississauga. The mother has made a point of stating that the father knew her email address because of the documents she has sent to the Shaikh to complete the divorce in Israel. She also states the father knew how to contact the grandfather in Ontario using WhatsApp.

[28] The mother was served with the father's application on October 10, 2018.

[29] The only relief the father seeks in the application is an order under section 46 of the *Children's Law Reform Act* (the "*CLRA"*) that incorporates the *Hague*

Convention into Ontario law, and Articles 3 and 12 for the return of the three children to Israel.

[30] The mother served her answer on October 26, 2018. In that answer, the mother asks that the father's claim be dismissed. She also asks for a temporary and a final order granting custody of all three children to her, and an order restraining the father from removing the children from the Region of Peel.

[31] The first case conference was scheduled for January 21, 2019 but could not proceed for reasons that included the fact that the father's lawyer had not filed a case conference brief. The parties therefore obtained February 22, 2019 as the next date for a case conference and the application was assigned to Justice McSweeney as the case management judge.

[32] The father made submissions in his case conference brief that the mother had denied him access to the children during this time. However, there is also reference in those materials that he knew the mother's cell phone number and that he made one telephone call during which he spoke to his daughter. According to the mother's affidavit sworn June 21, 2019, the father had not called the daughter again as of that date.

[33] The three children ultimately participated in at least ten video conference access visits with the father through Revive Supervision and Family Services. These access visits took place between August 24 and November 9, 2019, on a weekly or bi-weekly basis. These visits were supervised at the Revive access site and visit notes from each occasion were filed as exhibits at trial.

[34] McSweeney J. made orders at the case conference on February 22, 2019 that included an order requesting the OCL to appoint counsel for the children. As case management judge, McSweeney J. later gave detailed directions about the conduct of the hearing in endorsements dated April 5, May 5, June 20 and July 2, 2019. These orders and directions provided the parties with comprehensive trial management, including arrangements for the father to participate by video-conference.

[35] Directions were also given to ensure that copies of affidavits and document books be provided to the father in the same form as those before the court at the hearing. After consulting with counsel, the date was set for the hearing to commence on July 8, 2019. This start date would almost be two years after the mother and children arrived in Ontario.

Application made for refugee status in Canada

[36] The mother applied for refugee status on behalf of herself and the children under the *Immigration and Refugee Protection Act* ("*IRPA*") after arriving in Canada. The hearing for the *IRPA* application took place on September 24, 2018 before the Immigration and Refugee Board of Canada (the "IRB"). For oral reasons given by the presiding member on October 2 and transcribed on October 18, 2018, the IRB found the mother and the three children to be Convention Refugees. This recognition of the mother and the children as Convention Refugees was highly significant in the hearing before this court.

Father's position

[37] The following facts are a summary of the evidence given by or on behalf of the father relevant to the issues before this court.

[38] The mother abducted the three children from Israel and took them to Canada without his knowledge or consent on June 23, 2017. When she returned to Israel with the children in early July, the parties engaged in discussions to resolve their differences with a view to reconciliation. On July 27, 2017, the mother abducted the children again, and took them to Canada without his knowledge or consent. This time, the father filed an official complaint with the Israeli police against the mother for kidnapping.

[39] In his affidavit dated May 24, 2019, the father states that he does not know where the children are residing in Canada. As of the date of that affidavit, he also states that the mother has withheld the children from him entirely. She has not allowed him to communicate with them, except for one conversation he had with his daughter, R, over the telephone on April 3, 2018.

[40] Just before the mother left Israel for the second and final time in July, she filed false criminal charges against him in which she alleged that he assaulted her. He states that he was detained by police as a result. It was during this detention that the mother abducted the children and left Israel.

[41] The father states that he has never been charged with offences based on these allegations due to lack of evidence. He points to records from the Department of Justice, Haifa District as evidence that no charges were pursued by the authorities.

[42] The father commenced legal proceedings in the Sharia Court for a divorce, and for custody of the three children. He denies that it was the mother who filed for a divorce in that court. The father was awarded final custody of the children on October 30, 2017. At paragraph 20 of his affidavit, he explains the orders he obtained from the Sharia Court:

> 20. Following the respondent's abduction of the children, I commenced a petition for custody and divorce. The Sharia Court awarded me custody (access/ primary residence in Israel) of the children on October 30, 2017. A final order additionally granted me guardianship (custody in Israel) of the Children on February 6, 2018. The Orders of October 30, 2017 and February 6, 2018 are attached hereto as Exhibit "D".

[43] In the father's view, it would be a lie for the mother to take the position that the custody proceedings were conducted in the Sharia Court without notice. He refers to the decisions of the Sharia Court attached as Exhibit "D" to his affidavit where the Court describes the circumstances for making those orders in the mother's absence. He states that he has followed the proper procedure to attempt service on the mother during those proceedings. He describes how the court waited 25 minutes on February 6, 2018 for the mother to appear before making the final decision with respect to guardianship of the children.

[44] The father also disputes the findings of the IRB, which found the mother and each of the three children Convention Refugees on October 18, 2018. However, the father agrees with the written submissions filed with the IRB on behalf of the Minister of Immigration, Refugees and Citizenship that takes the position the Order of the Sharia Court dated October 30, 2017 "is valid, as no evidence has been adduced to challenge its legitimacy or application. The claimant has indefinitely deprived the children's father of the right of custody and access to which he is entitled".

[45] The father denies ever abusing the mother in his affidavit and demands strict proof of the abuse alleged. In his affidavit, the father:

a) Refers to affidavits attached as exhibits “J” and “K” respectively from Salsabeel Abu Saeed (Sabihat) and Bashir Salim Sabihat, described as the mother’s brother and cousin, respectively. They are a married couple who were neighbors in Salem village when the mother and father cohabited in Israel.

b) Relies on the statements made in each “deposition” where the deponent refers to the mother as “the kidnapper.” Each of these individuals make the statement “I have never (be) heard from the kidnapper, that Yehya (the father) behaves violence with their mutual kids or with her.” The giver of each deposition also states that he or she is publishing the deposition as a support to Yehya’s Sabeahat’s request for his children’s return as they were kidnapped by his wife, Raya Nataly Sabihat.

c) Denies the allegations of abuse made by the mother, stating the mother had never made an allegation of abuse against him until she abducted the children in 2017. He explains that the mother used the allegation that he was responsible for the “bombing” of her parent’s home as a

method of having him detained by the authorities him to allow her to leave Israel with the children in July.

d) States that the charges were not processed because there was no evidence.

e) Describes how he and the children had a very good relationship until the mother abducted the children for the first time in June 2017.

f) Advises the court there were never any incidents of abuse before the mother removed the children.

g) Confirms there is no allegation or denial that he is not a good father. The children attended private schools in Israel. They lived a good life and were happy.

h) Details how the relationship between the mother and the father began to unravel when the grandfather started stealing money from the father. He explains that the grandfather owed money to very influential people, and had resorted to stealing money from him (the father) to pay off his debts. This caused great tension between himself and the mother.

i) Describes how after her return in early July 2017, he and the mother attended the same wedding, but not together as is the custom, without the mother appearing to be in any fear of her safety.

j) States that the children have never been in any danger while in his care. Nor has the mother ever been in any danger because of him. The children would in no way be placed in an intolerable situation if returned to his care.

[46] The decision of the IRB that granted refugee status to the mother as the principle claimant and to each of the three children made a fundamental finding that, first, the mother had established that they would face a serious possibility of persecution in Israel if they returned, and second, because they were members of a particular social group, namely women and children, suffering from and facing future domestic violence. The father responds to the findings of the IRB in the refugee decision as follows:

a) Although he was provided with a copy of the final decision of the IRB, he was not provided with the mother's application for refugee status, or copies of any exhibits she might have attached to it. He has given evidence at the hearing before this court without the benefit of having those application materials to make a response.

b) He was not present at the hearing before the IRB, and did not have the opportunity to cross-examine the mother on her evidence.

c) As he was not present at the hearing before the IRB, he had no opportunity to call evidence contrary to the evidence given by the mother, or in his own favour.

d) He admits that he has been charged with criminal offences in the past. However, he has not faced criminal charges since 2006, other than the charges laid as a result of the mother's allegations she made against him before she abducted the children. All convictions against the father arose from events that took place between 2004 and 2006.

e) None of the offences charged, and none of the sentencing documents after conviction make any mention of organized crime or gang related activity.

f) In a sentencing document dated April 11, 2009, a court in Israel specifically states that "the offence was committed in January 2004 and since then there has been no criminal involvement. No drug use. 'They' lead a normative lifestyle". There is no explanation given as to why this document was dated in 2009.

g) He adamantly denies that the alleged “bombing” took place outside the grandparent’s home on July 25, 2017. He also states that, in fact, the Israel police did not prosecute him despite the mother’s allegation of his involvement as there was insufficient evidence, and that is because he was not involved at all.

h) The father relies on affidavits from two friends, Mr. Lior Yochanan and Mr. Erez Zohar, that he filed with the Israel police. These affidavits explain that the father was with them, and not anywhere near the residence of the mother’s parents in Haifa at the time of the incident. The father states that, in fact, he was in a different city at a hotel for a business meeting that day. The affidavits of Mr. Yochanan and Mr. Zohar were attached to his affidavit dated May 24, 2019 as exhibit “T” and “U” respectively.

i) As previously indicated, the grandfather owed money to very influential people in Israel. There are several suspects who may have been responsible for this incident.

j) The IRB made a finding that he bombed the family home of the mother’s parents, as if this were a fact. He states this is not a fact, and as the authorities in Israel determined there was no evidence of his

involvement. In his view, the IRB perspective was biased as the mother's word was accepted as the truth.

k) The IRB chose not to appoint a designated representative for the children. Therefore, their views and preferences were not heard when the IRB made its decision.

l) The mother was the only witness at the hearing before the IRB. Although the father does not have copies of the materials used in evidence, he understands there were statements allegedly attributed to him, including statements that he has murdered at least three people in the past. These are allegations he had no opportunity to respond to.

[47] The father also takes issue with the mother's submissions at the hearing before the IRB that the authorities in Israel would not or could not protect her from the father. In his affidavit, the father states that:

a) The mother is able to seek the assistance of the Israeli police if she is in danger.

b) The mother has taken only three steps to involve the authorities in Israel with respect to the allegations she has made. She has reported him to

the police on two occasions for assaulting her, and she obtained a Protection Order from the Israel Family Court.

c) She was granted the Protection Order from the court in Israel "following unsubstantiated allegations that I 'bombed' her father's vehicle" as proof the court is there to make orders to protect her.

d) The Israel police investigated both allegations made by the mother for the abuse alleged against the father before she abducted the children in June 2017. After the mother's return with the children in July 2017, the police investigated the 'bombing' at the grandparents' home later that month.

e) Documents on file with the Israeli police show that the mother was asked if she would like to go to a battered women's shelter, offers she declined on both occasions.

f) The mother made the allegations of abuse against the father and fled from Israel with the children before the police investigation was complete. She fled from Israel the second time immediately after the Protection Order was issued by the court. She did not allow the Israeli police an

opportunity to do their job before she left for Canada with the children on either occasion.

g) The mother's behaviour has been based on her *assumption* that the local authorities in Israel could not assist her.

h) The mother has provided no evidence that the Israeli police told her to leave Israel, even though they adequately responded to her complaints.

[48] The father quotes from the submissions made by the Minister at the IRB hearing. Those submissions included the following arguments that were specifically highlighted in those excepts:

- Rather than allow the judicial process to unfold, the claimant took the law into her own hands and fled the country with her children.

- There is no evidence to support the claimant's contention that the Israeli government, police, or court system refused or were unable to protect the claimant, or that they failed to adhere to the rule of law.

- It is not likely that the Israeli police and "several members of the Israeli government" would admit that they could not protect the claimant and would encourage her to abduct her children and flee the country.

[49] The father states that he is unable to enter Canada to see his children. For reasons unknown to him, the Canadian government has denied him entry into Canada. His lawyer in Israel, Mr. Harel Hacohen, has made enquiries at the Canadian Embassy in Israel for him. Mr. Hacohen has informed him that the Canadian Embassy requested that he provide them with several documents, including the father's criminal record, but has not answered any of his questions.

Mother's position

[50] The mother gave some of her personal history for context. She was born and grew up in the city of Haifa. Her family had a house in Haifa, and a house in the neighbouring village of Salem.

[51] When she 14 or 15, two of her cousins married members of Hariri family, who came from Salem. She attended those weddings and other family gatherings that included members of the Hariri family. It was at these events that the father noticed her and became romantically interested in her. He approached the mother's family and proposed marriage to her. The mother was only 15 years old at the time.

[52] The mother and the father had an engagement ceremony in 2006. They planned to get married in 2009, after the mother graduated from high school.

[53] The mother soon realized that she could not get along with the father. He was often angry and would shout at her. She broke off the engagement. However, the father would not accept this turn of events. For the next nine months, he continuously called the mother's parents to have her make up with him. The mother relates how she and parents were afraid of what might happen, and how the mother could be in danger if she continued to refuse the father's overtures. The mother also learned about a relative of the father's who had wanted to marry a woman. When the parents of the woman refused this request, the relative had shot a gun at the woman's house.

[54] Ultimately, the mother felt she had no choice but to resume the engagement. The mother and the father were married in July 2009, with the actual wedding party taking place on October 9, 2009. After their honeymoon, the mother moved to Salem to live with the father. The mother had turned 18 by this time.

[55] Shortly after the honeymoon, the husband hit the mother twice in the face. She hit him back. However, if the parties divorced two weeks into the marriage, it would be a mark of shame for the father to bear.

[56] The mother states that the abuse continued. Slaps and insults from the father became a regular part of her life.

[57] One time, when the mother found out the father had a lover, he tried to strangle her.

[58] The father controlled the mother's whole life during the marriage. She states he would threaten to kill her, and bury her in a place no-one would find.

[59] The mother would not contact the police for help because she thought this would only make matters worse with the father. She describes one time, in 2013 or 2014, when she contacted the police after he had assaulted her repeatedly over a number of weeks. The father had dragged her upstairs by the hair, an incident that the eldest son, M, still remembers. The grandfather removed the mother from this environment after this incident by taking her back to the grandparent's home in Haifa.

[60] The police paid a visit to the home of the mother and father in Salem. The mother remembers that she was too afraid to sign the police report in the end. She states that when she returned to her husband after these events, he would curse her because she had called the police. She states that he would regularly threaten her if she called the police again, saying that she would not stay alive.

[61] The mother states that the father was seriously violent towards her approximately twice a year. A few weeks before her birthday in July 2016, she

alleges that the father hit and kicked her so hard that she was bleeding internally from her stomach.

[62] The mother describes how she would run away after suffering a beating by the father, but she could not escape with her children. For that reason, she would always have to go back to him.

[63] June 16, 2017 was the Friday before the end of Ramadan. The mother had been shopping and had come home in a tunic because the zipper on her dress had broken when she was trying on clothes at a lady's shop. The father was enraged and went about hitting and kicking her in the body and head. She states that he stomped on her head and shoulders so hard she could see the imprint of his shoe on the skin of her arm. This beating occurred in front of the children.

[64] The mother suffered intolerable pain in her head from this beating. She could not hear any more from her right ear. She states that she still suffers a permanent loss of hearing in that ear as a result.

[65] The mother reported this assault to police. Although the father was taken into custody, he was never charged.

[66] The mother's parents encouraged her to return to her husband. She realized that her only option then was to flee the country and she did so with the children on June 23, 2017 by coming to Canada.

[67] The mother's brother, Amir, arrived in Canada a day later to persuade her to return to Israel and to the father because she had damaged the honour of his family. Amir told her that he and their parents had also been threatened by the father if she did not. When the mother refused this request, the grandfather flew to Canada within days to join Amir in urging her to return.

[68] Both the brother and the grandfather implored the mother to come back to Israel with the children because of the risk of great harm the father had allegedly threatened to cause. The grandfather purchased tickets on July 4, 2017 for the mother and the children to fly back to Israel.

[69] The mother states that she returned to Israel with the children on July 5, 2017 under duress because of the threats made against her family.

[70] The mother relates the following occurred after her return to Israel:

a) The father immediately forced the grandmother to bring the children and their passports to him. The mother remained living with her parents at their home in Haifa.

b) The father refused to allow the mother to see the children unless she signed custody of the children over to him. Although the father was to return the children within two days, he did not allow her to see the children after July 5, 2017.

c) On July 23, 2017, the mother obtained an order of protection (the "Protection Order") from the Israeli Family Court.

d) On July 24, 2017, the mother and the grandfather picked up the children at day camp where they had been enrolled by the father.

e) Between 2:00 a.m. and 3:00 a.m. on July 25, 2017, someone threw a grenade that exploded outside the grandparents' home. This explosion caused significant damage to the grandfather's car parked just outside the house. The explosion shattered the front window of the home. Shards of glass showered the mother and children where they slept.

f) The mother reported this attack to the police in Haifa, and told them that she believed that the father was responsible. She states that the Israeli police brought her, the three children and the grandparents to the airport and gave them advice about obtaining passports. The police

also told the mother that they were unable to protect her from the father and that she should leave the country.

[71] The mother, the children and their grandparents arrived in Canada on July 27, 2017. They started their applications for refugee status some time later when they were settled.

[72] The mother relies upon the following evidence to support her belief that the authorities in Israel cannot protect her if she returned with the children:

a) She reported instances of abuse at the hands of the father on numerous occasions prior to her departure with the children on June 23, 2017. No charges were ever brought against the father due to insufficient evidence.

b) After returning to Israel in July 2017, she sought the protection of the Israeli Family Court by obtaining a protection order. The grandparents' home in Haifa was bombed two days after she received the Protection Order, and only hours after she had retrieved her children from day camp.

c) The mother alleges that her situation is even more dangerous because she maintains the father is a family member of the Hariri family, which

she alleges to have a history of criminal activity. She referred to this history in the submissions on her application to the IRB. She attached a copy of news articles to her affidavit about a family feud in which the Hariri family is involved which continues to this day.

d) The mother also attached a copy of a scholarly article about honour and violence in the Arab Israeli community, in which the author comments about honour killings in that community. The author also talks about violence between crime families and expressly refers to the Hariri family.

e) The mother expresses her belief what the Israeli police told her about their inability to protect her and the children.

[73] The mother swore an affidavit on June 21, 2019 in which she adopted the statements made in her submissions to the IRB that she attached as an exhibit to her affidavit. The IRB accepted the evidence given at the hearing and found the mother and children all Convention Refugees.

[74] In her narrative filed in support of her application to the IRB, the mother describes how she and the three children left Israel to escape from the father. She stated that she is afraid of him, his father and brothers, as well as other members

of their organization who would easily kill her as a matter of honour because she had left him. She stated that her family members are also in danger because they helped her to escape with the children.

[75] The mother has been the primary caregiver for the children, and they are entirely dependant on her.

Position of the OCL

[76] The OCL accepted the request of the court to represent the children under section 89 (3.1) of the *Courts of Justice Act* made in the order of McSweeney J.

[77] When appointed, OCL counsel has a duty to ascertain the views of the child client in order to determine whether to take a position that mirrors those views: *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559. In this regard, counsel acting as the legal representative for the child client owes that child a fiduciary duty of loyalty, good faith and attention to his or her interests. This function can be distinguished from the role of the OCL in a non-*Hague Convention* case where the best interests of the child is the issue: see *Balev*, at paragraph 24.

[78] In performing its role, OCL counsel is entitled to make submissions on the evidence before the court but is not entitled to express his or her personal opinion on any issue. See *Strobridge v. Strobridge* (1994), 1994 CanLII 875 (Ont.C.A.).

[79] The OCL appointed Mr. Senson to ascertain the views and preferences of the children to the extent the children were able to express them. The requirement to ascertain the views and preferences of a child in a case is available as a resource in all family law cases involving children under Part III of the *CLRA*. Part III of the *CLRA* is where section 46 appears in the statute, through which the *Hague Convention* is made a part of Ontario law.

[80] Mr. Senson filed the affidavit of Roy Reid, a clinical investigator with the OCL, setting out the views and preferences he had obtained from interviewing each of the children. Mr. Reid was also called to testify at trial. In his affidavit and on the witness stand when examined, Mr. Reid told the court that while M and R admitted love for the father, each of those children were adamant they wished to remain living in Canada. Mr. Reid also conveyed that all three children still have memories of the father hitting the mother, and two of the children recall seeing him kick her. The children do not want to return to Israel because they fear the father will hurt the mother again, or that the parents will argue.

[81] The OCL submits that the facts in this case meet the requirements for the exception under Article 13(b). The OCL takes the position that the application of the father should be dismissed, and that Ontario is the jurisdiction in which to decide parenting issues over the three children.

Analysis

[82] Unlike other family law statutes in Canada that require the court to determine what kind of order would serve the best interests of a child, the *Hague Convention* is driven by parent rights. It has two objects: to secure the prompt return of children who have been wrongfully removed or retained, and to ensure that rights of custody and access under the law of one contracting State are effectively respected by another. It does not involve an analysis about what result would be in the best interests of the child: *Ludwig v. Ludwig*, 2019 ONCA 680. See also *Office of the Children's Lawyer v. Balev,* 2018 SCC 16.

[83] The determination of the custodial rights between parents has no place in an application under the *Hague Convention*. The limitations of its mandate were explained by Feldman J.A. in *Korutowska-Wooff v. Wooff*, 2004 CanLII 5548 (Ont. C.A.) as follows:

> [7] The purpose and effect of these provisions is to ensure that contracting states immediately and expeditiously return children who have been wrongfully taken by one parent away from the other custodial parent and removed to another contracting state. Consequently, the court of the contracting state to which the child was removed is not to enter into a determination of the custodial rights of the parties, but is to return the child to the state from which he or she was removed, in order that the custody and related issues be determined in that state.

Burden of Proof

[84] The requirements of the *Hague Convention* take priority over any other provision for the custody and care of a child. This legislative intent is made clear by the language in s. 46(8) of the *CLRA* that reads "where there is a conflict between this section and any other enactment, this section prevails."

[85] The burden to satisfy the court in the requested State that the children have been wrongfully removed is on the parent in the requesting State who has brought the application. Once the applicant has shown the court through evidence called on disputed issues or by agreed facts that the threshold conditions in Articles 3 and 12 are met, the court must order the return of the children to the requesting State unless an exception is found to apply.

[86] The parent who removed the children bears the evidentiary burden as the respondent to satisfy the court in the requested State that the circumstances of the case qualify under Article 13(b) or Article 20 as an exception: *Cannock v. Fleguel*, 2008 ONCA 758. Although this evidentiary burden remains on the person

resisting the application to return a child, every case depends on its own facts: *Pollastro v. Pollastro*, 1999 CarswellOnt 848 (Ont. C.A.).

[87] The burden to establish the exception to the rigorous exercise of Canada's treaty obligations under Article 12 of the *Hague Convention* is therefore borne by the mother. However, the court must consider whether the evidentiary burden remains with her, or whether that burden has shifted to the father because of the provisions of another treaty to which Canada is a signatory.

[88] The mother argues that a rebuttable presumption arises at common law because the IRB made certain findings when the mother and each of the children were granted the status of Convention Refugees in Canada. This status has a particular meaning under the *Convention Relating to the Status of Refugees* (the "*Refugee Convention*"), and the *Protocol Relating to the Status of Refugees*, both of which are UN Conventions that Canada has ratified.

[89] This designation is significant because of the findings the IRB made to grant this status to the mother and her children. On the evidence called at the hearing of the mother's application, the IRB found that the mother and children would face a serious possibility of persecution in Israel as members of a particular social group. This finding was made in the context of the mother's case, having regard to the particular circumstances of herself and the children.

[90] In *A.M.R.I. v. K.E.R.*, 2011 ONCA 417, the Court of Appeal considered the significance of a refugee determination by the IRB on an application under the *Hague Convention*. The Court held that in order to grant refugee status, the IRB would have to be satisfied on a balance of probabilities that a claimant for refugee status faced a reasonable risk of persecution in their country of origin. The Court ruled that findings by the IRB attract a high degree of deference because of the expertise and specialized knowledge of the IRB, and because its decisions are based on facts from evidence that it regards as trustworthy and reliable.

[91] In that context, the Court in *A.M.R.I.* expressed the opinion that where a child has been given refugee status, a rebuttable presumption arises that a risk of persecution exists if the child was returned to his or her country of habitual residence. The court concluded at paragraph 87 that this rebuttable presumption operates in the context of Article 13(b) and Article 20 in the following ways:

> [87] To conclude on this issue, the case for conflict between s. 115 of the IRPA and s. 46 of the CLRA fails and the doctrine of federal paramountcy does not arise. A finding of refugee status accorded by the IRB to a child affected by a Hague Convention application gives rise to a rebuttable presumption that the removal of the child from Canada will expose the child to a risk of persecution, that is, to a risk of harm. In these circumstances, Canada's non-refoulement obligations and the import of a child's refugee status must be considered under the art. 13(b) (grave risk of harm) and art. 20 (fundamental freedoms) exceptions to mandatory return under the Hague Convention.

[92] A rebuttable presumption that affects the legal rights between parties to a case lends itself to definition as a rebuttable presumption of law. How and why a presumption of law essentially reverses an evidentiary burden was explained concisely by Rothstein J. in *Pecore v. Pecore*, 2007 SCC 17, at paragraph 22:

> In certain circumstances which are discussed below, there will be a presumption of resulting trust or presumption of advancement. Each are rebuttable presumptions of law: see e.g. *Re Mailman Estate*, 1941 CanLII 57 (SCC), [1941] S.C.R. 368, at p. 374; *Niles v. Lake*, 1947 CanLII 5 (SCC), [1947] S.C.R. 291; *Rathwell v. Rathwell*, 1978 CanLII 3 (SCC), [1978] 2 S.C.R. 436, at p. 451; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 115. A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see Sopinka et al., at pp. 105-6.

[93] In this case, there is a rebuttable presumption by virtue of the IRB finding that the mother and children will be exposed to persecution in Israel. As such, there is a risk of harm if an order is made to return the children. While the burden of proof remains with the mother to show on the balance of probabilities that either exception under Article 13 (b) or Article 20 applies, the refugee decision raises the presumption at law supporting the same conclusion that was reached by the IRB. In these circumstances, the evidentiary burden shifts to the father to call persuasive evidence to displace the findings of fact behind the IRB decision.

Credibility

[94] The evidence given on the case by each of the parties and the witnesses they called are subject to credibility findings by the court. An assessment of credibility between witnesses can be made on the cross-examination of those witnesses. It can also depend on the evidence that witnesses gave, by affidavit or as testimony, when compared to other parts of their own evidence and the body of evidence as a whole.

[95] In *Al Sajee v. Tawpic*, 2019 ONSC 3857, Chappel J. listed the following considerations distilled from an extensive review of authorities as a guide to assessing credibility:

> a) Are there inconsistencies and weaknesses in the witness' evidence, including internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, or between their evidence and that of other witnesses?
>
> b) Did the witness have an interest in the outcome or were they personally connected to either party?
>
> c) Did the witness have a motive to deceive?
>
> d) Did the witness have the ability to observe the factual matters about which they testified?
>
> e) Did they have a sufficient power of recollection to provide the court with an accurate account?
>
> f) Is the testimony in harmony with “the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions?”

> g) Was there an internal consistency and logical flow to the evidence?
>
> h) Was the evidence provided in a candid and straightforward manner, or was the witness evasive, strategic, hesitant, or biased?
>
> i) Where appropriate, was the witness capable of making an admission against interest, or were they self-serving?
>
> j) Is there independent evidence that confirms or contradicts the witness' testimony?

[96] Of course, each finding of fact I made material to any conclusion deserves an explanation of how I resolved any disputed evidence with respect to that fact. I generally preferred the evidence given by the mother over the evidence given by the father because the evidence she gave in her affidavit was consistent with the evidence she gave at the hearing. She was not shaken in cross-examination, nor was her testimony shown to be inconsistent with evidence she had given elsewhere. I also preferred the mother's evidence because of its richness to detail.

[97] I found that the evidence given by the father did not directly address matters that were specifically troubling to this court. I also considered that answers the father gave under cross-examination, as well as the evidence of his witnesses, were inconsistent with evidence on important points contained in affidavits filed in support of his application.

[98] I did not make any assessment of credibility against the father, or discount the voracity of his evidence on any issue on the basis of character or demeanor,

or because he had been accused of criminal activity or other unlawful conduct. I made my findings on the best evidence available, not who gave it.

Article 13 (b)

[99] The opening words of Article 13 establish its primacy over the mandatory requirements of Article 12 by stating that it operates "notwithstanding the provisions of the preceding Article". Under this language, the protections built into Article 13 supersede the obligation of the court in the requested State to make a return order under Article 12 if the facts come within one of the exceptions under Article 13. By concluding that the court as the judicial administrative authority is not bound to make the return order in those circumstances, the court is also applying the provisions of the *Hague Convention*.

[100] In this case, the mother relies upon the exception found in Article 13(b). The key elements for this exception are whether there would be a grave risk that the return of the children would expose those children to:

i. Physical or psychological harm, or

ii. Otherwise place the child in an intolerable situation.

Grave risk of harm

[101] The Supreme Court of Canada, as the highest court in this country, defined the meaning of "grave risk" and the level of physical or psychological harm required for the exception to apply. In *Thomson v. Thomson*, [1994] 3 SCR 551. La Forest J. explained that the court will apply a restrictive reading of the grave harm exception. To interpret the exception correctly, the Court must accept that the word "grave" modifies the term "risk", and not "harm". As the Supreme Court stated a year before in *Young v. Young*, [1993] 4 S.C.R. 3, "harm is harm" from a child centred perspective. La Forest J. adopted the description of how great the risk must be to be considered grave from the statement of Nourse L.J. in *Re A (A Minor) (Abduction),* [1988] 1 F.L.R. 365 (Eng. C.A.) that:

> "the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. … that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the affect of the words "or otherwise" place the child in an intolerable situation."

[102] The Supreme Court further elaborated in *Thomson* that a grave risk, as that term is defined, must be read in conjunction with the language "or otherwise place the child in an intolerable situation." This approach led the Court to the inescapable conclusion that the physical or psychological harm contemplated by

the first clause of Article 13(b) meant that the risk of harm to a child must be found to amount to placing the child in an intolerable situation.

[103] In *Singh v. Ramotar,* 2018 ONSC 2964, Van Melle J. viewed the requirement to find that a child would be put to a grave risk of harm as being a risk that is greater than an ordinary risk that would normally attach to the transfer of a child from one parent to another. She concluded in that case that "the threshold required by Article 13(b) of the *Convention* is extremely high."

[104] This higher threshold for finding that a child is in grave risk of harm has been employed consistently by the courts in Ontario: *Redig v. Gaukel,* 38 RFL (6th) 87, affirmed at 2007 ONCA 521 and *Cannock v. Fleguel*. It is not a standard that adjusts for the return of a child of tender years. The court in *Usmani v. Hassan*, 2016 ONSC 6453 ordered the return of a child who was days short of his first birthday at the time of the hearing where it was found there would be no grave risk to a child despite his age. In that case, Hood J. concluded that the child must be returned to California where the father lived and where any allegations of psychological and physical harm could be dealt with in the California courts. Similarly, in *Perchel v. Perchel*, 2017 ONSC 6952, Trimble J. ordered the return of two children, ages nine months and two and half years old, to their father in the

United States, even though the mother did not have immigration status to enter that country.

[105] Article 13(b) does not require the court to make a finding of wrongdoing against the parent requesting the return of the children. Article 13 (b) only requires that the grave risk anticipated will expose the children to harm of a physical or psychological nature in the requesting State. This risk of harm must be real, whether or not the parent in the requesting State is the source of that risk. It must be shown that the change would place the child in a situation beyond what the court would consider appropriate for that child to tolerate. This would include exposing the child either to physical harm, or to psychological harm that would be considered intolerable in the circumstances relevant to that child.

Intolerable situation

[106] If this court were to order the return of the children to Israel, there is no doubt in my mind that the mother would accompany them and remain in Israel with them, or to be close to them.

[107] Numerous authorities have held that a grave risk of danger or harm to a mother proven to have an inextricable bond or interdependency with a child represents a grave risk of harm to that child. Harm to the mother therefore

becomes harm to the child. The Court of Appeal has recognized this interrelationship of the grave risk of harm to mother and child if returned to a violent environment.

[108] The Court of Appeal in *Pollastro* was asked to consider the evidence of the verbal and physical abuse the father had inflicted on the mother to assess the risk of harm associated with returning the child. Allowing the appeal and setting aside the order to return below, Abella J.A. (as she then was) explained at paragraph 34 as follows:

> On the facts of this case, the threatening phone calls reflect a continuing inability on the father's part to control his temper or hostility. This means that the mother, who would inevitably accompany the child if he is ordered to return to California, would be returning to a dangerous situation. Since the mother is the only parent who has demonstrated any reliable capacity for responsible parenting, Tyler's interests are inextricably tied to her psychological and physical security. It is therefore relevant in considering whether the return to California places the child in an intolerable situation, to take into account the serious possibility of physical or psychological harm coming to the parent on whom the child is totally dependent.

[109] The Court of Appeal more recently articulated this dynamic in *Zafar v. Saiyid*, 2018 ONCA 352.

[110] There is also judicial authority for the principle that returning the child to a potentially violent environment places the child directly into an inherently intolerable situation. In *Finizio v. Scoppio-Finizio*, [1999] O.J. No. 2362, this court

stated as a matter of common sense that to return children to a violent environment "would place them in an inherently intolerable situation as well as exposing them to a grave risk of psychological harm."

[111] In *Pollastro*, the Court of Appeal observed that:

> Although every case depends on its own facts and the onus remains on the person resisting the child's return, it seems to me as a matter of common sense that returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm.

[112] These decisions have introduced the concept of the "inherently intolerable situation" for a child if returned to an environment where violence is prevalent, with it's link to a grave risk of psychological harm. The presence of domestic violence in the factual matrix on this application makes the grave risk of harm to the children, directly or indirectly, more pronounced. There is evidence from the mother and at least two of the children that they witnessed the father physically striking the mother days before the mother fled with them on June 23, 2017. They witnessed the mother suffering an injury as an immediate result of this violence. If there is a reasonable prospect that this violence will reoccur, there is a risk that the children would be exposed to psychological harm, directly or indirectly, and therefore placed in an inherently intolerable situation.

[113] Shore J. in *Knight v. Gottesman*, 2019 ONSC 4341 reviewed several cases involving domestic violence as an active ingredient to find a grave risk of harm that would make the exception under Article 13(b) applicable. She turned to three questions framed by De Sousa J. in *Habimana v. Mukundwa*, 2019 ONSC 1781 to determine if the threshold has been met:

a) Has the alleged past violence been severe and is it likely to recur?

b) Has it been life threatening?

c) Does the record show that the offending individual is not amenable to control by the justice system?

[114] Before Shore J. answered all three questions in the case, she was deciding to make an order that the children be returned to the requesting State, she recognized that:

> [93] There is no question that in certain circumstances, a physical or verbal attack on a mother could cause psychological harm to the children. However, the situation in this case is far removed from the cases where courts have found grave risks of harm: Finizio v. Scoppio-Finizio, 1999 CanLII 1722 (ON CA), 1999 ONCA 1722, 46 O.R. (3d) 226 at para. 32 and Pollastro.

[115] Counsel for the mother referred to the decision of E.B. Murray J. in *Achakzade v. Zemaryalai*, 2010 ONCJ 318 with respect to the tendency for domestic abuse to reoccur after separation. After chronicling the incidents of

physical violence by the father as against the mother in that case, often in the presence of the child, Murray J. offered the following observation in reference to Article 13(b):

> [86] Is the danger of future harm lessened, because the parties are no longer cohabiting? Although judges a generation ago may have held that belief, we know now that the risk of domestic violence actually increases following separation. [23] Separation can mean a loss of control and an abusive spouse is often anxious to re-assert control. Despite the respondent's assurance that he knows that the marriage is over and that he just wants to have regular access to his daughter, I cannot ignore his clear resentment with the applicant's Article 13(b) claim. He has had to deal with allegations that he finds profoundly insulting. The allegations have hampered him in his ambition to become a police officer. Dealing with the allegations has cost him thousands of dollars.

Findings

[116] I make the following findings of fact for the purpose of this application. In Ontario, the civil standard for the court to make a finding of fact is measured on the balance of probabilities. This means that, having regard to all of the evidence, credibility of the witnesses on contested issues, and the weight allocated to evidence given by either side, the court concludes that it is more likely than not that something did or did not happen.

[117] The father points to the evidence given by Bashir Sabihat and his wife, Salsabeel Saeed, who lived close by the parties in Salem. Contrary to how they describe themselves in their affidavits, Bashir is actually the mother's brother, and Salsabeel is the mother's cousin. While these individuals gave evidence by

affidavit and by video-conference, their evidence was limited to the observations they made of the mother and father when socializing with others. That evidence was not relevant to the precise issues between the parties. It had no probative value about the relations between the father and the mother behind closed doors.

[118] The mother gave evidence that the father verbally and physically abused her over the course of the marriage, up June 16, 2017 when he assaulted her for the final time. Her evidence of this history of domestic abuse is key to the mother's claim under Article 13 (b).

[119] In order to assess the credibility of the parties, I have weighed the father's bald denial of any abusive conduct on his part against the mother's specific evidence. I cannot ignore the cogent evidence where the mother described the final assault. She described how the father struck her and kicked her about the body and head, with its aftermath of reported hearing loss. The father offers no alternative version of this event, or what took place between himself and the mother on this occasion.

[120] I did not find the father's evidence credible where he refuted this assault even occurred. I find it difficult to conclude otherwise when I compare that denial with the mother's description of events leading up to this assault, and the particulars of the violence she experienced.

[121] I also consider the detail provided by the children's recollection of this incident as they remembered it to Roy Reid during his interviews with them. Making allowances for the frailties of each child's ability to comprehend an act of violence or to remember what he or she witnessed, the recollection of the children are strikingly consistent with the evidence of the mother. The children described details that align with the mother's evidence, right down to the father's anger about the mother's dress, the father hitting and kicking her, and the blood coming from the mother's nose or mouth. The preponderance of this evidence makes the mother's account of the event more credible than the denial of the father.

[122] Evidence of this assault is relevant not only to whether incidents of abuse against the mother occurred, or if they were life threatening, but also to whether abuse is likely to reoccur. When the mother's evidence about prior abuse is considered, it is not difficult for the court to find that a pattern has developed over the marriage. This abuse, sometimes violent and often verbal, had grown in severity with time.

[123] The mother's description of the occasional assaults by the father, the incident in 2016 when he kicked her in the stomach, and the final assault satisfies this court on the balance of probabilities there is a clear and present danger that

the mother would encounter further physical or psychological abuse from the father if she returned to Israel.

[124] There is then the troubling matter of the grenade attack outside the grandparent's house in the early morning hours of July 25, 2017. It is noteworthy that the father has given evidence spanning two extremes. On one hand, he denies that the grenade attack occurred at all. On the other, he speculates that the grandfather owed business related debts to unsavoury individuals in the community, any of whom could have used the grenade for retribution.

[125] The father denies that he had any role in this attack, explaining that he was with friends at the time, and in another city. However, the affidavits of these friends contradict the father's own evidence by stating that they were with him on July 25, 2017 at a hotel in or on the outskirts of Haifa, and not in another city as he claims. The affidavit of each friend speaks only of spending time in the presence of the father on July 25, 2017, starting in the morning that day until early the next day, July 26. Those affidavits do not account for the father's whereabouts between 2:00 am and 3:00 am on July 25, 2017.

[126] I find as a fact that someone having an interest in the custody and control of the children was behind throwing a grenade at the grandparent's house during the early morning hours of July 25, 2017 in Haifa. I am not making any finding that

the father was responsible, or that he was in any way involved with this grenade. However, the coincidence between the fact that a grenade was detonated at the grandparent's house where the mother had taken the children the night after the day the mother had picked them up is remarkable. I therefore draw the inference that the grenade incident was carried out by forces sympathetic to the father's plight.

[127] Although I make no findings about his involvement, I give no weight to the father's denial that he had any knowledge of this incident.

[128] The father made submissions to the court that he is at a disadvantage because he was not present for the IRB hearing at which much evidence of this nature was accepted. He did not participate at that hearing as he had no notice of it. He submits that the evidence was accepted by the IRB without any cross-examination of the mother by him. The father therefore takes issue with the truthfulness or reliability of the mother's evidence received and considered by the IRB.

[129] In my view, having the decision of the IRB in the record for the father's application under the *Hague Convention* worked to his advantage. It gave him a form of discovery as to what the IRB accepted as evidence from the mother at her hearing. It told him what the IRB did not accept in the affidavit he initially filed in

support of this application in April 2018, as the refugee decision references that affidavit. It also let him know what documents or other information the IRB had for its hearing that he did not, so that he could ask for that disclosure under the *Family Law Rules*.

[130] The father had an opportunity to provide evidence in further support of the application, or to rebut any presumption arising from the IRB decision when he filed the main affidavit sworn on May 24, 2019. He had further opportunities to address the evidence given by affidavits filed by the mother in response to the application in the affidavit he filed in reply, and then again at the hearing. To my mind, the shifting of the evidentiary burden has been fair to each party, and has given the father ample opportunity to make his case.

[131] Finally, I heard evidence from Amir and from the grandfather about how the father and his friends forced their way into the grandparent's home. This evidence was disturbing. From both accounts, this intrusion occurred immediately after the mother removed the children from Israel for the first time in June 2017. Both Amir and the grandfather state in their affidavits that these individuals "were armed." Both state in their affidavit that the father told Amir to go "and get them back." One of the father's associates drove Amir to the airport where he boarded a flight to Canada for that purpose.

[132] I heard evidence from the grandfather about how the father and his friends occupied the family home for a week while Amir was in Canada. The grandfather deposed in paragraph 9 of his affidavit that:

> "The situation was stressful. The Applicant told me that unless I got Raya Natalie and the children back, he would chop off my head and those of my family. I know the Applicant's history and his reputation. My wife was extremely afraid for herself but also for our other children and grandchildren. So, I flew to Canada."

[133] The father did not provide a credible explanation to address this evidence in his reply affidavit sworn on June 27, 2019, or at the hearing. In my view, the father's conduct, described by the grandfather and supported by Amir, amounted to intimidating the mother's family to have her return from Canada.

[134] The findings from the evidence I have heard can be summarized in three ways.

[135] First, I find that the father has a history of periodically assaulting the mother over their marriage, culminating in the assault on June 16, 2017. There is a serious risk that these assaults will reoccur if she returns to Israel.

[136] Second, there are suspicious circumstances surrounding the grenade explosion at the grandparent's home on July 25, 2017. This grenade exploded after the mother had obtained the Protection Order from the Israeli Family Court, and she had picked up the children from day camp the day before. I find that this

incident occurred for reasons related to the fact that the mother took both of those steps. This evidence also shows an elevation of risk to the mother and the children.

[137] Third, the father and his friends or associates occupied the grandparent's home after the mother left Israel with the children the first time. This occupation took place to exert pressure on the mother's family to bring her back. The father is more likely than not to use intimidation in the future to attain his objectives.

[138] I am not making any findings about the father's alleged involvement with criminal organizations, or if he is even a member of a family linked to crime. Materials attached to the mother's affidavit, such as the newspaper article about the use by Muslims of civil courts in Israel the mother attached as Exhibit "B", or the "scholarly" article apparently written about honour and violence in the Arab Israeli community attached as Exhibit "M", are inadmissible as evidence. As those articles are not admissible, I have not taken anything in those writings into consideration to make this decision.

[139] The evidence that I have considered on this application comes from the firsthand account of witnesses. I have assessed the evidence given by individuals to determine which party has proven what elements on the balance of probabilities to make findings of fact necessary to decide the issues in this case.

[140] In my view, there is sufficient evidence in this case to conclude the standard for "grave risk of harm" set out in *Thomson* has been met. The risk of harm in this case is as great to the mother and to the children in its own way as the risk to which Tyler and his mother were exposed in *Pollastro*.

[141] In conclusion, I consider on the totality of the evidence that the mother would face a grave risk of physical harm if she returned to Israel with the children. This grave risk to the mother equates to a grave risk that the children would be exposed to psychological harm. Accordingly, an order for their return to Israel would place them in an intolerable situation.

Ability of the court or the police to protect

[142] I do not consider the availability of the courts in Israel to provide the necessary accommodation to alleviate this grave risk of harm. The Israeli Family Court issued the Protection Order on June 23, 2017, yet a grenade attack was made on the grandparent's house two nights later.

[143] The affidavit of the father erroneously states that the Israeli Family Court granted the Protection Order *following* the grenade explosion. It is beyond dispute that the Order was made *before* the event. I draw the inference of fact from the

sequence of events that the mother's Protection Order from the court had no deterrent effect on those responsible for mounting the attack that night.

[144] I have no evidentiary basis to make findings about what protection the Israeli Family Court, or the Sharia Court, would be able to provide to the mother and the children if they were to return to Israel. Neither party called evidence from an expert witness that would allow me to make findings of fact about what family law in Israel provides, or the resources available to the courts to enforce orders made, to protect vulnerable persons.

[145] The father filed a "deposition" from Mr. Hacohen, and called him as a witness to explain the roles between the Israeli Family Court and the Sharia Court, He was also asked to explain various aspects of family law in Israel.

[146] Mr. Hacohen was not called as an expert witness. He was not an independent witness. He is the father's lawyer and has a duty to represent his interests. Despite the best of intentions to assist this court, Mr. Hacohen would not qualify as an expert to give opinion evidence on those matters. In *White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23*, Justice Cromwell summed up the requirement that an expert must be independent of any party to give objective, non-partisan opinion evidence this way:

> [10] In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met, however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. This common law approach is, of course, subject to statutory and related provisions which may establish different rules of admissibility.

[147] The father also relied on the evidence of his criminal lawyer, Doron Noy, about the status of the inquiry by the police into the assault alleged by the mother. It was difficult for this court to determine if the father had charges remaining against him after a discovery in Magistrate's Court on September 18, 2018 ended with a request for a four-month adjournment.

[148] Mr. Noy also gave a "deposition" in which he described the law in Israel to protect against domestic violence. The deposition discussed the criminal law in Israel, as well as the interaction between the police with social and welfare agencies in domestic abuse cases. Mr. Noy's evidence was insufficient for the same reason that Mr. Hacohen's affidavit was insufficient to provide admissible evidence on Israeli family law.

[149] Further submissions were made about the ability of the Israeli police to patrol against any real or anticipated risk of harm to the mother. The mother gave evidence in her affidavit that the Israeli police drove her, the children and the grandparents to the airport, telling them that they could not protect them from the

father. The statement attributed to the Israeli police was not that they would not protect the mother and her family, or that they were unwilling to protect them. The mother testified that the police professed to her that they *could* not protect them.

[150] The statement of the police relating to an inability to protect the mother, the children, and the grandparents was introduced for the purpose of putting into evidence the fact that the statement was made, whether it was true or not. It was not hearsay evidence because it was not introduced for the truth of its contents. As the Supreme Court of Canada explained at paragraph 56 of *R. v. Khelawon*, 2006 SCC 57:

> 57 Putting one's mind to the defining features of hearsay at the outset serves to better focus the admissibility inquiry. As we have seen, the first identifying feature of hearsay calls for an inquiry into the purpose for which it is adduced. Only when the evidence is being tendered for its truth will it constitute hearsay. The fact that the out-of-court statement is adduced for its *truth* should be considered in the context of the issues in the case so that the court may better assess the potential impact of introducing the evidence in its hearsay form.

[151] This evidence relates to the state of mind of the mother as she was in the course of fleeing Israel with the children and her parents. As her evidence is accepted that the statement was made by the police, it is relevant because she believed it.

[152] I conclude that the father has not rebutted the presumption, based on the same finding by the IRB, that the police in Israel would not be able to protect the mother and the children from harm if they returned.

No undertaking offered

[153] The father offered the accommodation that the children would be able to reside with the mother upon their return to Israel. He stated that she is their mother. He also stated that he would abide by any order made by this court in Ontario.

[154] This offer to accommodate is illusory. The father has already obtained a final order for guardianship over the children from the Sharia Court, and he has not offered to vacate that order. There is no evidence before the court whether there is a mechanism for the father to have the guardianship order set aside, or if he would give his consent to that kind of order.

[155] In *Office of the Children's Lawyer v. Balev*, Chief Justice McLachlin wrote that the purpose of the *Hague Convention* is to return a child to the jurisdiction most appropriate for the determination of custody and access (at paragraph 24). In this case, no assurance or undertaking was given by the father that he will cooperate with the mother for a court in Israel to hold a hearing to determine what

parenting arrangement would be in the best interests of the children. The father's failure to give an undertaking of this nature is what distinguishes the facts of this case from those in *Thomson*. Without that undertaking, the father would be in a position to enforce the final order of the Sharia Court the moment the aircraft returning the children docked at the arrival gate.

Conclusion under Article 13 (b)

[156] The father has not rebutted the presumption arising from findings made by the IRB that have been substantiated on this application. The father has not displaced the presumption of law that the children would be at risk of persecution. I find on the evidence that the children would be at grave risk of being exposed to physical or psychological harm, or otherwise placed in an intolerable position if returned to Israel.

[157] This court concludes that the mother has discharged the burden to prove that she and the children qualify under the exception provided by Article 13(b) to having a return order made.

Article 20

[158] The refugee decision also brings principles of international law and human rights into play under Article 20.

[159] The exception under Article 20 reflects the recognition of fundamental principles of Canada relating to the protection of human rights and fundamental freedoms. The fundamental principles on which the mother relies in this case arise from the status of herself and the children as Convention Refugees.

[160] These principles, relating to the risk of persecution to a particular group and the inability of the authorities in the requesting State to protect those individuals, were discussed in *Canada (Attorney General) v. Ward,* [1993] 2 SCR 689. Central to the analysis of these principles is an individual's "well-founded belief" or fear that returning to the requesting State will result in persecution.

[161] The family law intersect between private parties and fundamental principles of international law was the focus in *A.M.R.I.* In that case, the Court of Appeal construed those fundamental principles to include the principle of *non-refoulement*, which prohibits the forcible return of a refugee to a country where it is likely he or she will be at risk of persecution. This principle is enshrined in the *Refugee Convention* to which Canada is also a signatory. Under the *Refugee Convention*, Canada is "prohibited from engaging in the *refoulement* of Convention Refugees, including children. Consequently, the exception to the return of children under Article 20 is engaged in cases involving refugee children": see paragraph 71.

[162] The status of the mother and the children as individuals who have been found Convention Refugees by the IRB is therefore significant in the context of an application for the return of a child under the *Hague Convention*. As the Court explained in paragraph 77 of *A.M.R.I*., "as in the refugee extradition context, a child refugee has a *prima facie* entitlement to protection against *refoulement*." At paragraph 87, the Court stated:

> [87] To conclude on this issue, the case for conflict between s. 115 of the IRPA and s. 46 of the CLRA fails and the doctrine of federal paramountcy does not arise. A finding of refugee status accorded by the IRB to a child affected by a Hague Convention application gives rise to a rebuttable presumption that the removal of the child from Canada will expose the child to a risk of persecution, that is, to a risk of harm. In these circumstances, Canada's non-refoulement obligations and the import of a child's refugee status must be considered under the art. 13(b) (grave [page26] risk of harm) and art. 20 (fundamental freedoms) exceptions to mandatory return under the Hague Convention.

[163] The principles discussed in *A.M.R.I.* were applied by Marion Cohen J. in *Borisovs v. Kubiles,* 2013 ONCJ 85. In that case, the court explained the discretion reserved to the court in the requested State this way:

> [46] I would also emphasize the importance of the finding by the IRB that the respondent and the child cannot be adequately protected from domestic abuse in Latvia. Generally speaking, in applications under the *Hague Convention*, the courts should assume that courts of the requesting country are able to deal with custody and access issues. [10] However, in the case at bar, the Immigration and Refugee Board has determined that the respondent and the child cannot be adequately protected from domestic abuse in Latvia. The IRB relied on evidence that "…the legal system, including the courts, did not always take domestic violence cases seriously." Both parties agree that the laws of the Latvia will not be adequately enforced by the police in cases of domestic violence. In any event, irrespective of the potential merits of a custody

> determination by a court in Latvia, the presumption that its justice system as a whole cannot protect the respondent and child, has not been rebutted.

[164] The same principle of *non-refoulement* that is engaged in their status as Convention Refugees protects the mother and the children for the purposes of Article 20. The evidentiary burden is on the father to rebut the presumption that the mother as well as the children would be provided this protection.

[165] I find that the evidence of the father has not rebutted this presumption. The burden could only be discharged by the father with persuasive evidence that he had taken steps to ensure the mother and the children would be free of any risk of persecution. I cannot think of what steps the father could take to ensure this protection, given the history of this family. Whatever that evidence could have been, empty promises they would not be harmed are not enough.

[166] I am therefore exercising the discretion provided to this court under Article 20 of the *Hague Convention* to conclude that the mother has established sufficient reasons for this court to refuse the making of an order for the return of the three children to Israel. An order for their return would not be permitted under fundamental principles to which Canada is committed under international law. Those principles relate to the protection of the human rights of the mother and each of the children, as well as to their fundamental freedoms to live free from serious risk of persecution.

Conclusion

[167] The application was dismissed for these reasons.

[168] If costs are claimed by either party for this application, I would expect counsel for the parties to obtain instructions and use their best efforts and professional skills to resolve that claim. If the assistance of the court is required on costs, written submissions may be made as follows:

a) from, or on behalf of the mother, by May 22, 2020;

b) from the OCL, by May 25, 2020;

c) from, or on behalf of the father, by June 12, 2020;

d) no submissions in reply shall be permitted, without leave; and

e) submissions from any party shall be limited to three, double-spaced typed pages, not including offers to settle or bill of costs.

[169] All written submissions with proof of service may be filed by email to my judicial assistant, at melanie.powers@ontario.ca.

[170] On a final note, I wish to thank all counsel for their professionalism and the quality of their advocacy in this difficult case.

"Original signed on file"

Emery J.

Released: May 7, 2020

CITATION: Sabeahat v. Sabihat, 2020 ONSC 2784
COURT FILE NO.: FS-18-0099-00
DATE: 2020 05 07

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

YEHYA SABEAHAT,

Applicant

- and -

RAYA NATALY SABIHAT.

Respondent

REASONS FOR DECISION

Emery J.

Released: May 7, 2020