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Citation: *Borisovs v. Kubiles,* 2013 ONCJ 85

ONTARIO COURT OF JUSTICE

B E T W E E N :

STANISLAVS BORISOVS,
Applicant

— AND —

INGA KUBILES
Respondent

Before Justice Marion Cohen
Judgment
Amended: March 5, 2013.

D. Apostolides ..... for the applicant
B. Nussbaum ..... for the respondent
C. Tempesta…….…….…….…….…….…….…..Office of the Children's Lawyer

Cohen, J.,

[1] In the case of *A.M.R.I. v. K.E.R.* [2011] O.J. No. 2449, the Ontario Court of Appeal considered the interplay between Canada's international obligations under the *Hague Convention*, and certain of the protective provisions of the *United Nations Convention Relating to the Status of Refugees.* The appeal involved a *Hague* application for the return of a child by her mother, in circumstances where the child had been accepted in Canada as a refugee by reason of abuse by the mother. The case at bar raises similar issues. The applicant for the return of the child is the child's father. The child has been accepted in Canada as a *Convention* refugee based on assertions of domestic violence perpetrated by that father. As in *A.M.R.I. v. K.E.R,* this case involves international, human rights and family law issues.

[2] The applicant, Stanislavs Borisovs, is the father of Linda Borisova, born February 27, 2004. The respondent, Inga Kubiles, is the child's mother.

[3] The parties are Latvian nationals, and have always resided in Latvia. They were married in July, 2001, and separated in June, 2006, when the respondent moved out of the matrimonial home with the child. They were divorced in 2007. The applicant and the respondent both remarried. In January, 2010, unbeknownst to the applicant, the respondent left Latvia with her parents, her new husband, and the child. The family arrived in Canada on January 22, 2010 at which time they claimed refugee status. The claim was successful. The respondent and all of her family members, including the child, were recognized as *Convention* refugees on October 6, 2011.

[4] On January 26, 2010, the applicant commenced the within application pursuant to the *Hague Convention*. He claims that the child was wrongfully removed from her place of habitual residence by the respondent in breach of his custody rights, and applies for the return of the child to Latvia, as well as for a declaration that Latvia is the proper jurisdiction to deal with issues of custody and access. The respondent asks the court to refuse to order the child's return. In the event the application is dismissed, the respondent asks the court to grant her custody of the child under the *Children's Law Reform Act.*

[5] In her defence to the application, the respondent invokes Articles 13(b) and 20 of the *Hague Convention*. Relying on the decision in *A.M.R.I. v. K.E.R.*, she asks that Articles 13(b) and 20 be construed in a manner that takes into account the principle of *non-refoulement* arising from the child's status as a refugee.

[6] The principle of *non-refoulement* arises from Canada's obligations under international treaties and domestic law, and is codified in section 115(1) of Canada's *Immigration and Refugee Protection Act.*[1] In the case of *Németh v. Canada (Justice)*[2] Cromwell, J., describes the principle of *non-refoulement* :

> Stated in broad and general terms, the principle of non-refoulement prohibits the direct or indirect removal of refugees to a territory where they run a risk of being subjected to human rights violations. The object of the principle is the prevention of human rights violations and it is prospective in scope. (par. 19)

In *Németh,* this principle is described as "a cornerstone of refugee protection."

[7] The Office of the Children's Lawyer, on behalf of the child, supports the mother's claim.

Background

[8] The applicant is 33 years of age. He studied business and economics at

[1] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

[2] [2010] S.C.J. No. 56

university, and has worked for a number of multinational corporations. He is currently employed by LG Electronics. Since the divorce of the parties, the applicant has remarried, and has adopted the child of his new spouse. In addition, he and his new wife have a child of their own, born in the fall of 2011.

[9] The respondent is 34 years of age. She has a Bachelor's degree in business administration. In Latvia she was employed as an office administrator and as an accountant. Shortly after the separation she began to cohabit with her new husband. She married him in 2008, and they have a daughter who is now four. The respondent and her new husband were co-owners of a walk-in medical clinic at the time they left Latvia.

[10] The parties disagree about the marital history. Each presents a different scenario. The applicant maintains that the marriage ended because the respondent was frequently having extra-marital affairs. The respondent states that the marriage ended because of the applicant's continuing physical, emotional, and verbal abuse of herself and her family. The applicant denies the abuse.

[11] The parties also disagree about the parenting history. The applicant states he was an actively involved parent, and the primary caregiver in the six months prior to separation. The respondent maintains she was the primary caregiver throughout the marriage. After the separation there were continuing disputes over access. The applicant states that the respondent often frustrated his access, and that for a period of several months he was denied access entirely. He states the access only resumed when the respondent was threatened that the child would be removed from her by the Orphan's Court. The respondent states that the applicant was inconsistent in exercising access, and that he insisted on exercising access according to his own schedule, rather that at agreed upon times. Ultimately these issues were resolved through court order.

[12] The parties agree that, following their separation in 2006, they engaged in legal proceedings regarding custody, child support and dissolution of their marriage. According to the Civil Law of Latvia, filed on the application without opposition, where parents are living together, they exercise custody jointly, and where parents live separately, joint custody of the child continues, unless agreed or adjudicated otherwise. On June 5, 2007, the Riga Orphan's Court granted joint custody to the parties with "daily sole custody" to the respondent. On December 18, 2007, the parties were divorced. Prior to the divorce judgment, on December 10, 2007, the parties entered into an agreement which provided that they would have joint custody of the child, with primary residence to the respondent. The applicant was to have access to the child on the first and third weekend of each month, a further four days during the month, and at other agreed upon times. The terms of the agreement were referenced in the divorce judgment. It appears that prior to the departure of the respondent and child from Latvia, the applicant was exercising access regularly on alternate week-ends.

Domestic Abuse

[13] The respondent's allegations of persistent physical abuse at the hands of the applicant, together with the failure or refusal of the Latvian authorities to provide protection, formed the grounds for her successful claim to refugee status in Canada, and form the basis of her defence to the claim under the *Hague Convention*. The respondent states that from the outset of the marriage the applicant pushed, slapped or hit her approximately once per month, and that the abuse escalated when the child was two. She states the child was present and would cry, and that the applicant might yell at the child, but would not hit her. The respondent described numerous incidents where she was the target of verbal and physical abuse, and death threats:

[14]

- She described an incident in 2005 when the applicant threatened to kill her, and a subsequent incident in 2006 when he assaulted her because she was defending the child from his verbal abuse;

- She states that in 2006, when she told the applicant she wished to separate, he threatened to kill her and the child;

- She states that after the separation, in October, 2006, the applicant often came into her home and yelled at her;

- She described an incident, also in 2006, when the applicant beat on her car windows while she was in the car, and threatened to smash her face so hard that no one would recognize her. When she left the car, believing that the applicant had departed, he hit her in the stomach, took her car keys and drove away in her car. When she attended at the police station to report the incident she was told that the police could offer her no protection;

- After an assault in May, 2007, when the applicant hit her in the face and stomach, the respondent states that the applicant grabbed the child and left with her. The applicant returned the child to the nursery school the next day. Again the police refused to respond;

- The respondent states that in 2008, the applicant broke into her apartment, tried to strangle her, and threatened to kill her. She states that the police were called but failed to attend;

- She states the assaults continued through 2008 and 2009. She states that the applicant repeatedly threatened her with death. In one instance, he stated he would kill the child if she sought to change the child's name;

- The respondent states that in November, 2009, the stairwell in her apartment building was set on fire. When the respondent saw the applicant the following day, he told her that the event was a warning, and that if she refused to divorce and return to him, "You will all be dead";

- She states that in December, 2009, while she and the child were spending the night at her parent's home, the attached garage was set on fire. Her father discovered the fire by chance. A window was broken, and portions of a wall were found covered in gasoline. The respondent states that the police found matches and a cloth with burned edges near the window. The respondent says the applicant called her the next day and said "Oh. You're all still alive?" Although the police were called and did investigate, no action was taken.

[15] The respondent deposes that, throughout this period, her family members were also abused by the applicant. She states that, in 2001, her father was seriously assaulted by the applicant when he tried to speak to him about his abusive behaviour. The assault caused a brain injury, and the respondent's father was hospitalized. The respondent describes an incident in 2006, when the applicant attended at the family business, yelling and screaming, causing customers to leave. When the respondent's father attempted to escort the applicant from the premises, the applicant hit him in the face and abdomen.

[16] The respondent asserts that throughout 2008 and 2009, the applicant's violent behaviour towards her family continued. The respondent says her mother was assaulted by the applicant when she refused to disclose the respondent's whereabouts to him. She states that the applicant made numerous attempts to sabotage her family's business, including creating disturbances on the premises, and committing acts of vandalism. The company car was vandalized three times. The applicant also threatened her family members with death.

[17] The respondent's evidence was corroborated. She filed affidavits by third parties supporting her claim of abuse by the applicant. The respondent's brother deposed that he had seen bruises on her arms and legs after she had argued with the applicant. The respondent's mother, father and her new husband corroborated the allegations of abuse, death threats, arson, and police inaction. Both the respondent's brother, and his wife, confirmed being present at the house when the police were investigating the burning of the respondent's parents' home. A business client of the respondent's parents in Latvia deposed to being present at their place of business, and hearing the applicant shout "I'll kill you all!" The witness also observed the respondent's parent's residence after the fire, saw the broken garage window, and smelled the fuel on the walls. The respondent's co-worker in Latvia deposed that she was aware that the respondent had consulted with a doctor and psychologist at the clinic, and that the company car had been vandalized several times.

[18] The assertion of police inaction was also corroborated. The respondent filed copies of her reports to the police, and evidence of the police decisions not to institute criminal proceedings, from October 2006, May 2007, December 2009. The respondent believes she was denied protection because 'the applicant's mother is a member of …city council and…the applicant is a wealthy man with a great deal of influence." This claim was not corroborated, although there was some evidence to corroborate the assertion that the applicant's mother had associations with the assessor/psychologist employed by the Orphan's Court.

[19] For his part, the applicant denies acts of physical or emotional abuse towards the respondent. He states he himself was the victim of abuse by the respondent's family, including suffering assaults by the respondent's father and her new husband on two occasions. He acknowledges that on one of these occasions he responded to the attack "by kicking them in the groin". He states that the police did investigate some of the allegations and found no wrong-doing on his part. He described several incidents that occurred when he entered the applicant's apartment, but denied being violent. He acknowledged the incident in which he took the respondent's car keys from her and drove off with the respondent's car, but denied any assault had occurred.

[20] The applicant filed no affidavit evidence in support of his version of events, although he has been represented by counsel throughout and had ample opportunity to do so. He also declined, as likely to cause further delay, the opportunity, offered by the court on several occasions, to participate in an oral hearing through the use of Skype technology. As will be seen, he also declined to produce to the Children's Lawyer written consents to the release of information, from the police and other authorities, which might have buttressed his account. He did produce a report from the police regarding the arson investigation, which indicated his name was not mentioned in the investigation, but acknowledged in his own material that that the police do not respond to domestic disputes, and that even if a report is made, nothing will happen.

The Refugee Claim

[21] The respondent states that after the incidents of arson, and the subsequent inaction by the police, she and her family concluded that they were unsafe in Latvia and could not rely on police protection. She stated that the family chose not to seek asylum in a European country because he applicant worked for an international corporations and travelled widely in Europe. The respondent and her family left Latvia with the child, stopping in England, and then proceeding to Canada, where they made their claims for refugee status. The family arrived in Canada on January 22, 2010. The refugee hearing was held on August 5, 2010, and the decision was rendered on October 6, 2011.

[22] The respondent's claim was based on section 96 of the *Immigration and Refugee Protection Act* – Domestic abuse and membership in a social group – family. The

respondent and her family members testified at the hearing. The materials filed on the refugee application were disclosed to the parties in this proceeding, and the decision of the Immigration and Refugee Board ("IRB") was filed. The allegations were the same as those in the *Hague* application. The respondent and her family members, including the child, were found to be persons in need of protection under section 97(1) (b) of the *Act*.[3]

[23] The Board found the applicant and her family members to be credible witnesses, and that their evidence was consistent. The Board concluded that "The claimants provided sufficient credible evidence in support of their claims," and that "The principal claimant's story is reasonable and believable, given the country conditions documentation on domestic violence and state corruption in Latvia." The Board observed that while domestic violence is a significant problem in Latvia, the law is not effectively enforced. Accordingly the Board decided that "there is a reasonable chance or a serious possibility that [the claimants] would suffer persecution on a Convention ground, and that state protection would not be reasonably forthcoming" if they were to return to Latvia.

[24] The applicant states that the refugee claim was based on lies. The applicant states that the allegations of abuse were fabricated to satisfy the Canadian authorities, and that the respondent and her family came to Canada due to financial problems, including unwise investments and fraud. The respondent denies these allegations, and asserts that the family businesses continue to operate and are profitable. A co-worker who had taken over the respondent's business confirmed in an affidavit that the business was doing well.

The Report of the Children's Lawyer

[25] On January 30, 2012, I made an order requesting that the Office of the Children's Lawyer ("OCL") represent the child. Subsequently the OCL arranged for an investigation by a clinical investigator. An affidavit of the clinical investigator, Shari Borrows, sworn July 30, 2012, was filed with the Court. In my view, the investigation was thorough. The clinical investigator interviewed the applicant father by telephone

- [3] 97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
- (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
- (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
- (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
- (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

twice, as well as his wife and mother. At the request of the applicant, she also interviewed the Pastor at the Church in Toronto attended by the respondent and family in Toronto.

[26] The respondent was interviewed twice, once in person and once by telephone. The investigator met with the child twice. In addition, the investigator and counsel interviewed the child's teacher, reviewed the child's Ontario Student Record, and interviewed the respondent's new husband, and her parents.

[27] The investigator deposed that she had hoped to obtain further information from a number of relevant collateral sources in Latvia, including the police, and obtained facsimile consents from the respondent for that purpose. While offering to cooperate, the applicant did not provide original signed consent forms, although requested to do so by direct email to him, as well as to his counsel.

[28]

[29] The clinical investigator reported as follows:

- The child is 8 years of age and in grade 3. According to her teacher, the child is an excellent student - helpful, happy and well-behaved. The child is fluent in Latvian, Russian and English. She described having many close friends and liking school. She is well-settled in Canada;

- The child is closely connected to the respondent, her younger half-sister in Canada, and her maternal grandparents;

- Although the child had some positive memories of her life with the applicant, she also had numerous negative memories;

- The child recalled witnessing conflict and violence between the parents, including an occasion when she saw the applicant slap the respondent's face. She also recalled the applicant yelling at the respondent, and hitting her;

- The child expressed fear of being sent away from her mother, and is worried that her mother would be hurt by her father in Latvia;

- The child fears that the applicant will come and return her to Latvia. She seemed open to access by her father if she could be assured he would not take her away. She is also agreeable to access to him through Skype, email, letters and gifts;

- The investigator described the child as bright and articulate;

- The child expressed a strong and consistent desire to remain in Canada with her maternal family;

- The investigator concluded that to separate the child from her mother and family in Canada and return her to Latvia would have a negative impact on the child's emotional well-being;

- The investigator also concluded that a placement with her father would have a negative impact on her emotional well-being.

[30] The applicant was provided with a copy of the OCL report, and chose to file an affidavit in response. At no time did he request an oral hearing, again citing the potential for delay. The applicant continued to deny the abuse, and accused the mother of influencing the child against him.

Wrongful Removal

[31] The underlying purpose of the *Hague Convention* is to protect children from the harmful effects of their wrongful removal, and to establish procedures to ensure their prompt return to the state of their habitual residence.[4] Accordingly, where a child has been wrongfully removed from her place of habitual residence, Article 12 mandates the return of the child "forthwith," unless the respondent is able to establish she is entitled to an exception provided for under the *Convention*. Thus the first step in determining a Hague application is deciding whether the applicant has established that a wrongful removal has occurred.

[32] The parties and child had always resided in Latvia. The joint custody agreement remained in effect at the time the respondent removed the child from Latvia. Despite the initial difficulties regarding the applicant's access, it is not disputed that the applicant was regularly exercising access to the child at the time the respondent removed her from Latvia. The applicant was not informed of the respondent's intention to leave with the child, nor did he acquiesce in her removal.

[33] Based on this evidence, I am satisfied that the child was habitually resident in Latvia, that the applicant had joint custody rights under the law of Latvia, that he was exercising his joint custody rights at the time of removal, and that the child was removed by the respondent in breach of those rights. Accordingly, I find that the removal must be considered wrongful under Article 3 (a) and (b) of the *Hague Convention*.

[4] *Husid v. Daviau*, [2012] O.J. No. 4580 (Ont.C.A.))

Defences Under Articles 13(b) and 20 of the Hague Convention, and the principle of *Non-Refoulement*

In *J.E.A. v. C.L.M.*[5], Cromwell, J.A. (as he then was), observed that

> The watchwords of the Convention… are deterrence of international child abduction, rapid return of the child, restoration of the status quo and deference, in so far as determining the child's best interests is concerned, to the courts of the place of habitual residence.

Yet, as Cromwell, J. went on to state:

> Even though the prompt return of an abducted child is the strong policy underlying the Convention and the Act, an order for return is not automatic in all cases. There are exceptions. By means of these exceptions, the Convention and the Act try to reach a compromise which balances the flexibility needed to deal with particular cases and the effectiveness needed to deter international child abduction…. (Par.32)

[34] In this case the principles of deterrence of international child abduction, rapid return of the child, restoration of the status quo, and deference to the courts of the place of habitual residence, are tempered by a number of factors: the mother and child have been recognized as refugees in Canada, it is argued (and a rebuttable presumption exists) that return of the child would expose the primary parent and the child to danger, and that the Latvian justice system as a whole is unable to effectively protect victims of domestic violence.

[35] The compromise referred to by Cromwell, J., must balance the undoubted need to deter child abduction with Canada's international obligation to protect refugee children from removal to a territory where they run a risk of being subjected to human rights violations.

[36] In *A.M.R.I. v. K.E.R.,* the Court held that "the principle of *non-refoulement* is directly implicated where the return of a refugee child under the Hague Convention is sought" (par 67). How then does the Court give adequate recognition to the principle of *non-refoulement*, while at the same time adhering to the strict standards articulated in the *Hague* jurisprudence? In *A.M.R.I. v. K.E.R.,* the Court of Appeal held that adequate recognition of the principle requires the following:

[37]

1. **The Hague application judge must treat the child's status as a refugee as giving rise to a rebuttable presumption of risk of persecution or other serious harm to be faced by the child if a return order is issued.**

[5] [2002] N.S.J. No. 446 , at par.31,

[38] *A.M.R.I. v. K.E.R.* stands for the proposition that a finding of refugee status accorded by the Immigration and Refugee Board to a child affected by a *Hague* application gives rise to a rebuttable presumption that the removal of the child from Canada will expose the child to a risk of harm if a return order is issued. This presumption arises because a successful refugee claim means that the Immigration and Refugee Board has been satisfied, "on a balance of probabilities, based on evidence that it regards as trustworthy and reliable", that the refugee claimant faces a reasonable chance of persecution. Given that the Immigration and Refugee Board has expertise and specialized knowledge, a decision of the Board on fact and credibility driven issues must be accorded a high degree of deference. At the same time, the presumption of a risk of harm is rebuttable. Unlike the proceedings before the Immigration and Refugee Board, in a *Hague* application, where an exception is claimed, the applicant has the opportunity to respond to allegations made against him. The Court is not bound to accept the findings of the Board. Furthermore, in assessing the credibility of the claim, the Court will be alert to the potential for abuse of the refugee determination process by a parent to gain tactical advantage in a custody battle.

2. The Court must consider Canada's *non-refoulement* obligations, and the import of a child's refugee status, under the art. 13(b) (grave risk of harm) and art. 20 (fundamental freedoms) exceptions to mandatory return under the *Hague Convention*

[39] Prior to returning a refugee child under the *Hague Convention*, the Court must consider the child's risk of persecution in her country of habitual residence. A "risk of persecution" in the refugee context clearly involves the grave risk of harm contemplated by Article 13(b) of the *Convention*. Under Article 20 of the *Convention*, the principle of *non-refoulement* must be considered among Canada's "fundamental principles ... relating to the protection of human rights and fundamental freedoms"

3. The Court must consider that by virtue of her status as a Convention refugee, the child's section 7 Charter rights to life, liberty and security of the person are engaged in a *Hague application*.

[40] A *Hague* application to remove a refugee child to the country in which she has been found to face a risk of persecution implicates her liberty and security interests. As a matter of fundamental justice under section 7 of the *Charter*, the child has a right to a "risk assessment" prior to her removal, and to a fair process. The risk assessment will proceed on the basis of the rebuttable presumption, and a consideration of the risk to the child's human rights if she were involuntarily returned. A fair process entitles the child to adequate disclosure of the case, a reasonable opportunity to respond to it, and a reasonable opportunity to state her own case. In addition, in *A.M.R.I. v. K.E.R.*, the Court held that in the context of a child refugee, the child's views gain greater importance, and

that her views should be considered in accordance with her age and maturity. The fact that the child is not a party to the application does not detract from her right to be heard.

Article 13(b)

Article 13(b) provides that

> 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 opposed 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.

[41] The *Hague Convention* has been described as an efficient, but also a "fragile tool.[6]" The dicta in *A.M.R.I. v. K.E.R.*, do not detract from the requirement that judicial interpretation of the exceptions in the *Hague Convention* be rigorous, in order to preserve the efficacy of the *Convention*. The jurisprudence on Article 13(b) emphasizes that the risk of harm must be "weighty" and "substantial" - "something greater than would normally be expected on taking a child away from one parent and passing him to another." (*Thomson v. Thomson*[7]). The harm contemplated must be such that the child would be placed in a situation which is "intolerable." An application under the *Hague Convention* is not a custody application.

[42] Nonetheless, the case law is also clear, following *Pollastro v. Pollastro*,[8] that the risk of harm to a child may be indirect. The party invoking Article 13(b) may be the child's primary parent, and it may be inferred that harm to the child's primary parent will harm the child. In *Pollastro*, the Ontario Court of Appeal held that a continued pattern of escalating emotional and physical abuse, combined with threats against the mother and her family, were sufficient to create an intolerable situation for the child. Abella, J.A. (as she then was), stated that

> …it seems to me 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....Since the mother is the

[6] *F. (R.) v. G. (M.)*, [2002] J.Q. No. 3568 (Que. C.A.), cited by Rosenberg, J.A. in *Jabbaz v. Mouammar* (2003), 38 R.F.L. (5th) 103 (Ont. C.A.) at 508

[7] [1994] 3 S.C.R. 551. (p.596))

[8] [1999] O.J. No. 911

> 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."

[43] More recently, in *Husid v. Daviau*,[9] the Ontario Court of Appeal held that

> In Pollastro v. Pollastro (1999), 43 O.R. (3d) 485, at p. 496, this court developed upon the "harm is harm" direction to hold that Article 13(b) is available to resist a child's return when the reason for the child's removal is violence directed primarily at the parent who removed the child: "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."

[44] In the case at bar, the respondent has filed evidence of continuing and escalating abuse by the applicant. Some of this abuse, most particularly the fearsome incidents of arson, directly threatened both the mother and the child. The child was with the mother on the occasions when fires were set to her home and the home of her grandparents. The child's presence in the home with her mother was foreseeable. Furthermore, the mother and the child did not receive police protection. The respondent's evidence is corroborated in affidavits filed by relatives, friends and co-workers. Her reports to the police, many years before her departure to Canada, in a country where little credence is given to complaints of domestic abuse, and where police indifference is endemic, are also corroborative. The fact that her parents came with her, despite her father's apparent frail health, and despite the added expense, as well as the risk of being sent back to Lavia, suggests the extremity of the family's desperation.

[45] The same or similar evidence was presented by the respondent to the Immigration and Refugee Board as to this court. The result was a finding that the respondent and the child were refugees based on a well-founded fear both of persecution by the applicant, and that state protection would not be forthcoming. The child refugee has a prima facie entitlement to protection against *non-refoulement*. A rebuttable presumption has arisen that the return of the child to Latvia would expose her to a grave risk of harm. The applicant, despite having ample opportunity to do so, has failed to rebut the presumption. His denials, together with positive reports from his new wife and mother, are insufficient. Doubts have been raised about the independence and credibility of the report from the Orphan's Court in Riga, filed in this hearing, attesting to his character. Given the respondent's fear of the applicant, I draw no inference against her claim from the fact she entered into a joint custody agreement with him.

[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.

[9] [2012] O.J. No. 4580, par. 23

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.

[47] The report of the Children's Lawyer suggests that the child was aware of the applicant's violence towards her mother and frightened by it. She is frightened that her mother will be hurt by her father. The child is closely connected to her mother and ought not to be separated from her. If the mother were to return to Latvia with the child, which would be inevitable if return were ordered, she would be exposed to a dangerous situation. The child's situation would be intolerable. I find the respondent has established the exception under Article 13(b) of the *Convention*.

Article 20

[48] Article 20 provides for the denial of an order of return if it would not be permitted "by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms". The principle of *non-refoulement* of refugee children is engaged as a fundamental principle. In *A.M.R.I. v. K.E.R.* the Court noted that the principle is

> …also complemented, and enlarged beyond its application to refugees, by international human rights law prohibitions on the removal of a person to a real risk of torture or other cruel, inhuman or degrading treatment or punishment or other forms of serious harm: see e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1485 U.N.T.S. 85, at art. 3(1); International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, at art. 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 222, at art. 3; Németh at para. 19. (par. 55)

[49] In the case at bar, the applicant is the perpetrator of the abuse which has resulted in the child's presence in Canada. The respondent and child would face a risk of serious harm in Latvia. State protection would not be reasonably forthcoming. Ordering the child's return in these circumstances is not permitted by fundamental Canadian principles relating to the protection of human rights and fundamental freedoms. The

[10] (*Ellis v. Wentzell-Ellis*, [2010] O.J. No. 1987 (Ont.C.A.)); *Medhurst v. Markle* (1995), 26 O.R. (3d) 178 (Ont. Gen. Div.), at 182, "It is to be presumed that the courts of another contracting state are equipped to make, and will make, suitable arrangements for the child's welfare." (cited in *Jabbaz v Mouammar* 2003CarswellOnt1619).

exception under Article 20 has been established.

Child's Views

[50] The child in this case is eight years of age. Nonetheless, she is bright and articulate, and was able to express her views and preference to the Children's Lawyer. She is afraid her mother will be harmed by her father. The basis of her fears has been validated by other evidence. She wishes to remain with her mother in Canada. It is appropriate to take account of her views.

[51] In the result, the applicant's application for return of the child is dismissed.

[52] Before concluding, I wish to comment on the issue of delay in this case. The father's application was commenced almost immediately on the respondent's departure in January, 2010. The prompt return of a child is one of the objectives of the *Hague Convention*, and it is for this reason that the *Convention* precludes a full inquiry into the "best interests" of the child in the state to which the abductor has fled with the child[11]. Clearly there has been unusual and unfortunate delay in this case, and it would not have been possible to ensure the prompt return of the child. I would point out that there were efforts to expedite the matter. On consent of the parties, the application proceeded based on affidavit evidence. Despite the manifest contradictions in the affidavit evidence, none of the parties sought an oral hearing, even one that could have been facilitated by the use of electronic technology. Considering the need for interpretation of the evidence, an oral hearing would in any event have contributed to further delay.

[53] Much of the delay arose because the parties were awaiting the outcome of the refugee claim, and subsequently for the outcome of an investigation by the Office of the Children's Lawyer. These were justifiable reasons. The refugee claim, for obvious reasons, was of immense importance. The investigation by the Office of the Children's Lawyer was an efficient expedient. By virtue of this investigation, not only was the child able to put her views and preferences before the Court, but the applicant was afforded an additional means by which his position could be advanced in the proceeding. The report of the Children's Lawyer was, importantly, the means by which evidence from the child's family in Latvia came before the Court. The report also provided, through interviews with the child, evidence of the child's "views on the merits of the application considered in accordance with the child's age and level of maturity." It was imperative, given the child's age, that the Court receive independent submissions on her behalf. In light of the complex considerations arising from the forced return of a refugee child to her country of origin, these are not frivolous reasons for delay. As the court of Appeal observed in *A.M.R.I. v. K.E.R.*, where there are serious credibility issues in Hague applications, "Expediency will

[11] *J.E.A. v. C.L.M.*, [2002] N.S.J. No. 446 (N.S.C.A.), per Cromwell, J.A.

never trump fundamental human rights.[12]"

[54] Finally, I will state that I have determined this application independently of the issue of delay, and independently of the obvious facts that the child is well settled in Canada, and that it is unrealistic to suppose that the status quo in Latvia could have been meaningfully restored. I have found that the merits of the respondent's defence to this application are decisive, without resort to the issue of the potentially disruptive effects on the child of ordering her return to Latvia.

[55] The Hague application having been dismissed, this court accepts jurisdiction in this matter. There will be an order of interim custody to the respondent. The parties will attend on a date to be set by the case management coordinator to address the process for resolution of the issues of custody and access.

Released: March 5, 2013.

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Justice Marion Cohen

[12] *A.M.R.I. v. K.E.R.*,par. 125