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[23/04/2002; Ontario Superior Court of Justice (Canada); First Instance]
Kovacs v. Kovacs (2002), 59 O.R. (3d) 671 (Sup. Ct.)

COURT FILE NO.: 01-FA-10212

DATE: 20020423

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

M.K., Applicant and MM.K., Respondent and THE ATTORNEY GENERAL FOR ONTARIO, Intervenor and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION (CANADA), Intervenor

23 April 2002

FERRIER J.:

[1] In March 2001 the respondent arrived at Toronto's Pearson International Airport from Hungary with her three year old son G., and 14 year old daughter A. A few days before leaving Hungary, she had separated from her husband, the applicant, and had surreptitiously left the country with her children. A. is a child of the respondent's previous marriage and is not the subject of any claim by the applicant.

[2] The applicant had not known of, nor consented to, G.'s removal from Hungary, nor had he consented to the respondent removing G. from his care.

[3] Upon her arrival at the Toronto airport, the respondent claimed refugee status for herself and on behalf of her children. Eventually the applicant learned of the respondent's whereabouts, and launched this application for an order for the immediate return of G. to Hungary pursuant to what is commonly referred to as the Hague Convention.

[4] The ultimate question in this application is whether such an order can be made for the immediate return of G. whilst there is a pending claim on his behalf for status as a Convention Refugee pursuant to the federal Immigration Act of Canada.

[5] I have come to the conclusion that the answer to that question is yes, and that the Hague application ought not to be stayed to await the final determination of G.'s claim for refugee status.

Background

[6] The applicant is 43 years old, having been born on March 1, 1959 in Budapest. He is an entrepreneur. The respondent is 38 years old, having been born on August 28, 1964. She is a housewife.

[7] The respondent is a Roma (gypsy).

[8] The parties had lived together for about three years and were then married on September 21, 1991 in Hungary. G. is now four years old. He is their biological child and was born December 2, 1997.

[9] G.'s habitual residence is Hungary. The family last lived together in Tata, Hungary.

[10] In early March 2001, the respondent went with the child to Mohacs, Hungary, purportedly to visit relatives, and was to return home March 11, 2001. She did not return and travelled by plane from Hungary to Canada on March 29, 2001.

[11] The applicant subsequently commenced a proceeding in the Municipal Court of Tata, Hungary for a divorce and custody, and he was granted custody of the child on June 22, 2001.

[12] The respondent has taken no steps to have that judgment set aside, and has not brought an application in Ontario for a custody order.

[13] In July 2001, this application was commenced.

[14] The basis of the respondent's refugee claim in short summary, is that she was subjected to physical and psychological abuse by the applicant; that on two occasions the child was physically abused by the applicant; and that the state of Hungary was unwilling or unable to protect her and the child. Progress of this Application

[15] The Hague Convention on the Civil Aspects of International Child Abduction, dealt with more fully below, requires an application for the return of the child to be dealt with expeditiously. The whole thrust of the Convention is to have the child returned to his home state immediately unless the respondent can establish one of the few defences available, based on risk of harm to the child or contravention of fundamental rights. It is readily apparent that an expeditious determination will be impossible if the Canadian refugee screening and adjudicating process runs its normal course. The tenets of the Hague Convention will be defeated.

[16] This application was slowed by an adjournment on September 11, 2001, when the courthouse in Toronto was evacuated, and has also been delayed as a result of the necessary intervention of two more parties on the constitutional issues, but was nevertheless heard within seven months. The norm is about three to four months.

[17] The application was commenced on July 6, 2001. An interim ex parte order was obtained prohibiting the removal of the child from Toronto pending the return of the application. The respondent was then served.

[18] On July 12, 2001, the respondent filed responding material and indicating she was seeking refugee status. On consent the matter was adjourned to July 26, 2001.

[19] In response to a notice of a constitutional issue, the Attorney General for Ontario ("A.G.") was added as an intervenor party and the Minister of Citizenship and Immigration ("MCI") was added with leave on August 30, 2001.

[20] A case conference was held on September 4, 2001.

[21] On September 11, 2001, the Attorney General sought procedural orders and asked that part of the constitutional challenge of the respondent be struck.

[22] This motion was only partially completed due to evacuation of the courthouse. Matters of scheduling the next steps in the application were put over to November 7, 2001 (the first available date for all counsel).

[23] On November 7, the court ordered a schedule for filing further evidence, examinations on affidavits, and fixed the hearing date for January 28, 2001.

[24] The schedule was met.

The Progress of the Refugee Claim thus far

[25] The immigration authorities were made aware that the mother had abducted the child from Hungary as early as March 22, 2001, some seven days before she arrived at Pearson International Airport. This information was passed on to the R.C.M.P. and Canada Immigration. Indeed, it was entered into Canada Immigration's computer system by the R.C.M.P. at national headquarters as a part of the National Missing Children's Services Program, "Our Missing Children".

[26] The respondent and her two children arrived in Canada at Toronto's Pearson International Airport on March 29, 2001 where they were examined by an Immigration Officer, at which time she indicated she was seeking refugee status for herself and the children.

[27] On March 29, 2001 at the Pearson International Port of Entry, the Immigration Officer examining the respondent called Peel Regional Police as a result of an entry in Citizenship and Immigration Canada's ("CIC") Field Operations Support System ("FOSS") database. The non-computer-based ("NCB") entry in FOSS indicated that G. K. and A. N. were reported missing and that they were in the company of the respondent. The NCB entry instructed that if they were encountered the police were to be called. In addition to Peel Regional Police, the RCMP Missing Children's Registry was also contacted on March 29, 2001 while the respondent and her children were at the Port of Entry. The notes from the CIC file show that the RCMP indicated that there was no world-wide arrest warrant outstanding and that there were no grounds to detain the respondent and the children. The notes indicate that the RCMP requested the Canadian address information for the respondent.

[28] Upon arrival at Pearson International Airport the immigration officer, and senior immigration officer, were both aware of the abduction. Their computer contained a notification as follows when the mother's name came up: "Abducted her two children ... from Hungary on 13 March 2001". In addition, the computer indicated "Missing Child from Hungary since 13 March 2001."

[29] The Immigration Policy Manual required the immigration officers to fill out a Missing Children Report and forward same to their regional co-ordinator. This was not done.

[30] The Immigration Policy Manual also permits these officers to contact Interpol, the Hungarian consulate, the municipal police in Hungary, the father, and the Ontario Central Authority under the Hague Convention. There is no indication that any of these steps were followed in the case at bar.

[31] On March 29, 2001, the respondent and her two children submitted a Notification of Claim to be a Convention Refugee and they were issued Acknowledgements of Convention Refugee Claim.

[32] On March 29, 2001, the respondent was also issued a Notice of Adjournment or Deferral of Examination under the Immigration Act, instructing her to complete and return the form entitled "Information on Admissibility to Canada and Claim to be a Convention Refugee".

[33] Pursuant to s.110(2) of the Immigration Act, CIC seized the passports of the respondent and her children. The passports remain in the possession of CIC.

[34] On April 3, 2001, the Canadian Embassy in Hungary received a letter from the applicant, Mr. K. His letter asserted that the respondent abducted the children and took them to Canada without his consent. The contents of the letter were entered that same day into the FOSS database used by CIC.

[35] On April 20, 2001, CIC received from the respondent and her children the Information On Admissibility To Canada And Claim To Be A Convention Refugee forms and Background Information Documents.

[36] On May 18, 2001, an Immigration Officer examined the respondent and her children and issued them reports under ss.20(1)(a) of the Immigration Act, finding that they did not comply with the Immigration Act and Regulations by failing to obtain visas before appearing at the Port of Entry.

[37] The next step in the immigration process is for a senior immigration officer to make a determination as to whether the mother and the two children are eligible to make a refugee claim. This determination was made on May 20, 2001. The senior immigration officer had available to him a letter from the father, delivered to the Canadian Embassy in Hungary, dated April 3, 2001, the English text of which was placed in the Canada Immigration computer. The father clearly states: "I have not given my consent to my spouse to take my children out of Hungary (she abducted my children)".

[38] On May 20, 2001, a Senior Immigration Officer found the respondent and her children to be eligible to have their claims determined by the Convention Refugee Determination Division of the Immigration and Refugee Board ("CRDD"). Their claims were accordingly referred to the Refugee Division: Immigration Act, s.46.01

[39] Notwithstanding the fact that the Senior Immigration Officer knew, or ought to have known, that there was a custody dispute between the parents, that officer was prepared to conclude that the mother could unilaterally make a refugee claim on behalf of the three year old child. There is no evidence in the Record to indicate that the Senior Immigration Officer even addressed his mind to the question of whether the fact that the mother had physical custody of the child was a sufficient legal basis to conclude that she also had the legal authority to commence a legal process (that could determine the child's immigration status in Canada) without the father's consent or a Court Order.

[40] On May 20, 2001, the respondent and her children were issued conditional Departure Orders, which will become effective under the Immigration Act if the Refugee Division determines that the respondent and her children are not Convention refugees. The Departure Orders will be deemed to be deportation orders if the respondent and her children do not certify their departure within the time prescribed by the Immigration Regulations: Immigration Act, ss.28(2), 32.01(1), 32.02(1)

[41] On May 20, 2001, the Immigration and Refugee Board ("IRB")issued the respondent and her children Notices to Appear before the Convention Refugee Determination Division on January 13, 2003 (one year and eight months later) in regard to their claim to Convention refugee status. A Notice to Appear addresses the situation where no Personal Information Forms ("PIFs") have yet been filed at the Immigration and Refugee Board. Once the PIFs are received from the claimants, the date on the Notice to Appear is no longer applicable and a new date for the hearing is established by the Board.

[42] On June 25, 2001, the Immigration and Refugee Board received the PIFs of the respondent and her children, which provide details of the grounds for their claims. The PIFs were received by the CIC Hearings and Appeals office from the IRB on August 23, 2001.

[43] The Intervenor, the Minister of Citizenship and Immigration, does have authority to intervene at the refugee hearing. Section 69.1(2) of the Immigration Act and the Immigration Policy Manual states that the request for intervention must be made at the time that the Senior Immigration Officer finds that the person is eligible to make a refugee claim and forwards the case to the Immigration and Refugee Board. This was not done in this case. Instead, the Minister formally notified the Board of his request to intervene some four months later on September 18, 2001.

[44] On September 5, 2001, the Minister's representative, a CIC Hearings and Appeals Officer, wrote to the IRB (and copied counsel for Mrs. K.), giving notice of the participation of the Minister regarding the claims of the respondent and her children. The Officer's letter sets out the circumstances of the litigation in this court, namely that Mr. K. has made an application under the Hague Convention for the return of his son G. K. The letter requested an expeditious hearing of the refugee claims and that a designated representative other than the mother or the father be designated for the children (as their interests may be in conflict with those of the applicant or the respondent).

[45] In a letter, dated September 18, 2001, the Minister's representative wrote to the Immigration and Refugee Board, providing it with formal notice of the Minister's Intent to Participate at the hearing as matters involving Article 1F(b) of the Convention Relating to the Status of Refugees have been raised by this claim. Article 1F(b) excludes from refugee protection a person who there are reasonable grounds to believe has committed a serious non-political crime.

[46] At no point has the federal Minister contacted the father, or counsel for the father, for the purposes of the refugee hearing. No attempt has been made to permit the father to outline his concerns regarding the abduction of his children, the authority of the mother to unilaterally make a refugee claim on the children's behalf, or the substantive issue of whether the children are at risk from the father.

[47] Indeed, the only material in the refugee proceeding which sets out the father's concerns came from the motion material filed by the mother in this court to strike out some of the father's affidavit material. Copies of this court material was forwarded by counsel for the Minister to its Litigation Management section, who in turn forwarded this material to the Hearing Officer who then filed this material with the Board. There is no indication in the Record that the father, or his counsel, have themselves been offered the opportunity or asked by the Hearings Officer to provide material, or to participate in the refugee hearing.

[48] On October 18, 2001, the Minister's representative wrote to the IRB, setting out the importance of having the refugee claims heard expeditiously and notes that a representative for the child claimants should be designated.

[49] On or around October 24, 2001, the Minister's representative received a call from the IRB Registry, which was canvassing dates of availability from the parties for the hearing in these claims. On November 5, 2001, the IRB Registry confirmed that the hearing date for the refugee claims of the respondent and her children is scheduled for February 11, 2002 at 8:30 a.m.

[50] I have been advised by counsel that at the hearing on February 11 only procedural matters were considered, including the question of the appointment of a representative for the child. Refugee Determination in Canada

[51] When claimants indicate their intention to claim refugee status during their port of entry examinations with an Immigration Officer, they are, inter alia, fingerprinted, their passports are seized and they are given the appropriate forms to fill out and return by mail, in order for an eligibility determination to be made regarding their claims by a Senior Immigration Officer.

[52] Once the required forms are filled out and returned by the claimants, a Senior Immigration Officer makes a determination regarding eligibility to claim refugee status. If the claimants are found to be eligible to have their claim determined by the Convention Refugee Determination Division of the Immigration and Refugee Board, their claims are referred by the Senior Immigration Officer to that Board, which then holds a hearing and makes a determination as to whether the claimants are Convention refugees.

[53] A determination as to whether a claimant is a Convention refugee requires an assessment by the Refugee Division on whether the claimant meets the definition of a Convention refugee prescribed in the Immigration Act, which includes whether they are outside the country of the person's nationality, whether the person has a well-founded fear of persecution and whether the protection of the state is not available to them: Immigration Act, s.2(1)

[54] The Hearings and Appeals Officers at CIC represent the Minister at hearings before the Immigration and Refugee Board. Information provided to the Hearings and Appeals Office can be considered by the Minister's representative, in determining whether participation at the hearing by the Minister is appropriate. Examples of when it may be appropriate for the Minister to intervene include situations where there may be an indication that the claimant has participated in activities, which if true, would render them excluded from the definition of a Convention refugee (e.g. participation in crimes against humanity or serious non-political crimes). Information received can be put forward by the Minister's representative at the refugee hearing.

[55] The Immigration Act sets out that the Refugee Division shall deal with all proceedings before it as informally and expeditiously as the circumstances and the considerations of fairness permit (s.68(2)). There are provisions in the Immigration Act, giving authority to the Chairperson of the IRB to prescribe a system of priorities for dealing with matters and guidelines for carrying out their duties (s.65(1), (3) of the Act).

[56] The Immigration Act and the Convention Refugee Determination Division Rules, SOR/93-45, provide for the Refugee Division to make determinations, on application from any party, the refugee hearings officer or the Minister's representative regarding the participation of witnesses at the refugee claim hearing. The Refugee Division may itself call witnesses if appropriate, pursuant to s.67(2)(a) of the Immigration Act (see for example, the Convention Refugee Determination Division Handbook, Chapter 1, Conduct of Refugee Proceedings).

[57] Pursuant to ss.68(3) of the Immigration Act, the Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

[58] The IRB issued its Guidelines on Child Refugee Claimants in 1996 and was the first refugee determination system in the world to do so (see s.3.40 of IRB Performance Report for 1999). The Guidelines set out that the Refugee Division should give primary consideration to the "best interests of the child".

[59] In regard to representation of child claimants before the Refugee Division, the IRB's Convention Refugee Determination Division Handbook, Chapter 12, states as follows:

The Refugee Division is required to designate a representative for any claimant who is 17 years of age or younger pursuant to Immigration Act, s.69(4). Often, the person designated is a parent or guardian. However, even in that case, the Refugee Division should ensure that there is no conflict of interest and that the best interests of the child are considered in appointing the parent or guardian (e.g., where there are allegations of kidnapping or abuse against the parent). …

[60] The affidavit of Barbara Jackman, an expert in the area of immigration law, deposes that there is no procedural mechanism in place whereby the absent parent can make his or her views known concerning whether his or her children should or need to make a claim to refugee status. Canada Immigration did not follow its own policies under the "Our Missing Children" policy where the abducting parent makes a refugee claim unilaterally on behalf of the child. The Senior Immigration Officer who makes the determination that the child is eligible to make a refugee claim gives the other parent no opportunity to be represented, to appear and make submissions, or even notification that the child's eligibility is being determined. In addition, the Immigration and Refugee Board's procedures for the appointment of a representative of the child neither mentions nor takes into account the status or views of the other parent. There are no provisions in the Immigration Act or the Rules of the Board which contemplate participation of an absent parent in the refugee hearing, or that would permit the father in the instant case to be added as a party, or permit his counsel to make submissions to the tribunal.

[61] The IRB is an independent decision-maker, performing quasi-judicial functions, created by an Act of the Canadian Parliament in 1989. The goals of the IRB are three- fold, as set out in its electronic publication, entitled Convention Refugee Determination: What it is and How it Works:

- To hear and determine refugee claims as quickly as possible in accordance with the law and in a manner which reflects Canada's humanitarian traditions;

- To ensure that individuals and groups cannot use refugee claims or "the refugee status determination process" as a means to circumvent our national immigration policies; and

- To reassure the world community that Canada has an effective and humanitarian refugee determination process that is consistent with our international commitments.

[62] The Immigration and Refugee Board Performance Report (for the period ending March 31, 1999), indicates that the Refugee Division continued to bring down its processing time over the course of 1998-99 to an average of 11.8 months for 1999, with a goal for the following year of finalizing claims within eight months. The estimates for 2000-2001 indicate

that an increase in the projected intake in refugee claims may lead to an 11 month processing time.

[63] The IRB produces Country Reports, which provide the statistical data on the number and status of refugee claims made in Canada, sorted by country of origin. The IRB Country Reports for April 1999 through June 2001 include the national and Toronto data regarding claims from Hungarian nationals. The IRB Country Reports demonstrate that some refugee claims made by Hungarian nationals have resulted in Convention refugee status being granted.

[64] There are a number of possible outcomes in the refugee determination process. The possibilities include, for example, that the respondent and her children may be found to be Convention refugees if the Immigration and Refugee Board determines that they have a well-founded fear of persecution as prescribed by the definition in the Act, or their claims may be denied. It is also possible that the respondent may be found to be a Convention refugee while the children are found not to be Convention refugees or vice versa. Furthermore, where there are serious reasons for considering that a claimant has committed, for example, a crime against humanity or a serious non-political crime, the claimant may be excluded on the grounds of Article 1F of the Convention Relating to the Status of Refugees: Immigration Act, s.2(1)

[65] The Refugee Division could also decide to sever the claims of the children from that of the respondent. This was done by the Refugee Division in F.Z.C. (Re). That case involved claims by two Hungarian children, aged 7 and 4, which were based on the harm they suffered as a result of witnessing their father's alleged abuse of their mother. The claims of the children were originally joined to their mother's claim, which alleged domestic abuse by the husband in Hungary. However, the Refugee Division was provided evidence of the provincial court litigation involving a Hague application to the B.C. Supreme Court by the father and an application for custody by the mother. As a result, the Board appointed a Designated Representative for the children and severed the claims of the children from that of their mother and heard the children's claims separately. The Board stated that by doing so, the custody issue was properly removed from the jurisdiction of the IRB: F.Z.C. (Re), [1999] CRDD No. 292.

[66] In refugee claims where Convention refugee status has been granted to Hungarian nationals, the persecution has been based on various grounds identified in the Convention refugee definition. This has included, for example, the grounds of race or membership in a particular group, such as the Roma, and it can include gender- related persecution or membership in a particular group, such as persons suffering domestic violence: Immigration Act, s.2(1); J.G.G. (Re), [2001] CRDD No. 81; O.S.T. (Re), [2000] CRDD No. 80.

[67] In J.G.G. (Re), for instance, the Refugee Division found that the male claimant and the minor claimants had established that they had a well-founded fear of persecution on the basis of their Roma ethnicity in Hungary and that while state protection may be available for individual cases of Roma claimants, it was not found to be available in that case as the claimants gave uncontested credible evidence of the failure and inability of the police to protect them. On the other hand, the Refugee Division found that the female claimant's individual circumstances did not establish the subjective element of a well-founded fear of persecution required for a positive decision in her claim: J.G.G. (Re), supra.

[68] The Refugee Division's decision in O.S.T. (Re) provides an example of a positive finding of refugee status for a Hungarian national, who was Roma and who based her claim on domestic violence by her common-law spouse. In that case, the female claimant was found to

have given credible evidence about the continuing abuse to which she was subjected. The Refugee Division also found that while the claimant made efforts to obtain protection, state protection in Hungary was not available to her: O.S.T. (Re), supra. Information Concerning Leave Applications to the Federal Court

[69] A survey conducted in the Toronto office of the Immigration Section of the Department of Justice canvassed the average time for leave decisions from the Federal Court of Canada for this office. This survey, not purporting to be a systematic and definitive statistical analysis on the matter and meant only as a guide on the average time for leave decisions for the Toronto office, examined a random sample of 100 files. The results of this survey indicate that it takes an average of 4.0 months from the date a person filed an application for leave until leave was denied by a Federal Court Trial Division Judge. The average length of time for decisions in cases where leave was granted was 7.19 months.

[70] The MCI submits that, any delay in the processing of the Hague application caused by a leave application to the Federal Court would not prejudice Mr. K. with respect to Article 12 of the Hague Convention, which mandates the return of the child if proceedings are commenced before one year has elapsed since the time of the wrongful removal. Mr. K. did commence a Hague application within one year of the alleged wrongful removal. Regarding Article 12 of the Hague Convention, the travaux préparatoires states that "as regards the terminus ad quem, the article has retained the date on which proceedings were commenced instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interests of parties protected by the Convention."

[71] While I agree that Article 12 does protect the application of the mandatory return provisions, and to that extent, Mr. K.' interests are protected, I disagree with the submission that delays will not harm the interests of Mr. K. Further, the potential harm to the child by mere delay may be considerable.

[72] In summary therefore, the Hague applications in this court can usually be completed in three to four months. The refugee determination process to the completion of a hearing usually takes about a year.

The Hague Convention

[73] The Convention has been reviewed in many cases, most notably by the Supreme Court of Canada in Thompson v. Thompson, [1994] 3 S.C.R. 551. There the court fully reviewed its rationale and its provisions. It is not necessary to repeat that analysis here. It is sufficient to note that the spirit of the Convention requires that these matters be dealt with expeditiously and that the children be returned to their home state immediately unless the respondent can establish one of the defences on a balance of probabilities. Further, the host jurisdiction, in Hague applications, does not enter into an examination of the best interests of the child in the context of a custody determination - but rather deals only with those issues that arise under the Convention. The host court does not make a custody determination in favour of the applicant even if the child is ordered returned – that determination is left to the home state.

[74] Because of the peculiar constitutional make-up of Canada, the Hague Convention is implemented through provincial, not federal legislation. In Ontario, that legislation is the Children's Law Reform Act, R.S.O. 1990, c.C.12, s.46 ("CLRA").

[75] In contrast to the expeditious procedure under the Hague Convention, some might describe the refugee claim process as leisurely. Others might describe it as painfully, if not shamefully, slow. Whatever characterization is apt, the process as it presently operates,

could not be said to meet the objective of the Hague Convention to ensure that the issues related to G. are dealt with expeditiously. While I recognize, of course, that the Hague Convention has no application to the Immigration Act, this court, if it has jurisdiction, must have as its paramount concern the best interests of the child, taking into account the provisions of the Hague Convention. Aspects of Refugee Claims under the Immigration Act

[76] Section 3(g) of the Immigration Act lists as one of the Act's objectives "to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted". The Supreme Court has stated that "this overarching and clear human rights object and purpose [in s.3 (g)] is the background against which interpretation of individual provisions must take place": Immigration Act, s.3(g); Pushpanathan v. Canada (M.C.I.), [1998] 1 S.C.R. 982 at 1024.

[77] The Act fulfils that s.3(g) objective by providing that, unless there are security or danger to the public concerns, Convention refugees have a statutory right not to be removed from Canada. Eligible refugee claimants awaiting a final determination of their claims also have a similar right not to be removed under the Immigration Act.

[78] Persons found to be Convention refugees pursuant to the Immigration Act have, subject to exceptions not applicable here, the right to remain in Canada. Removal of a Convention refugee may only occur if the Minister finds, pursuant to s.53, the refugee to be a danger to the public or to the security of Canada: Immigration Act, ss.4(2.1), 5(1), 53.

[79] For persons claiming status as Convention refugees, there is no statutory right to enter Canada to claim such status. However, once on Canadian soil, a person may make a refugee claim. A person found eligible by a senior immigration officer to claim refugee status is issued a conditional removal order. The order is "conditional" insofar as it will only become effective if the person is found not to be a Convention refugee. While a claimant awaits a determination by the Convention Refugee Determination Division of the Immigration and Refugee Board of his or her status, the Act provides a stay of that order, thereby prohibiting removal from Canada. Moreover, if the decision of the Board is negative and the person files a timely application for leave to commence judicial review of that decision with the Federal Court Trial Division, the Act provides a stay of removal pending determination of the leave application by the Federal Court Trial Division. The stay of removal continues if there is then a timely appeal to the Federal Court of Appeal and Supreme Court of Canada: Immigration Act, ss.28(2), 32.1(6), 44, 45, 46.01, 49(1)(c).

[80] There is no provision in the Immigration Act which prescribes who may make a refugee claim on behalf of a three-year old child. Apparently the practice is that anyone can initiate such a claim. Once initiated, the Act requires the CRDD to designate "another person" to represent the minor in the proceedings. [S.69(4)]. That person may be a parent, but in cases of conflict between parents the practice is to appoint someone other than a parent to represent the child.

[81] The parent seeking refugee status may present evidence on the parent's claim but not on the child's claim. The child's representative may present evidence on the child's claim. The opposing parent, such as Mr. K. in the case at bar, has no right to present evidence, or to be present at the hearing. He may be given the opportunity to testify, at the behest of the CRDD, the Minister or the child's representative, but he has no status before the IRB or the CRDD.

[82] The above noted s.69(4) is the only provision in the Immigration Act which deals with how a claim on behalf of a minor is processed. The Act is otherwise silent. Thus, the stark

reality of Canada's refugee claim process is that an abducting parent can bring a child to Canada and claim refugee status on behalf of that child without the consent of the other parent. The process thus begun could take years to complete. The opposing parent has no right to participate or be present at the hearing.

[83] Apart from any other defects this procedure may exhibit, at the least, the very initiation of the refugee claim has effectively defeated the major purpose of the Hague Convention – to have the child immediately returned to his home state to permit that state to determine the custody issue between his parents (unless one of the defences is established).

Sections 40 to 45 of the Children's Law Reform Act

[84] The father, as applicant, has brought his application pursuant to the Hague Convention only. The Convention is incorporated into s.46 of the CLRA.

[85] The father has not brought his application under the other provisions of the CLRA dealing with the enforcement of extra-provincial orders, specifically, ss.40 to 45.

[86] The father is clearly entitled to bring his application only under the Convention. He is not required to rely at all on any of the other provisions of the CLRA. The Convention can be an independent source or ground for the application. Accordingly, ss.40 to 45 of the CLRA are not engaged in any way in this application. Writing for the majority of the Supreme Court of Canada in Thomson v. Thomson, [1994] 3 S.C.R. 551 at 603, La Forest J., held that an application may be brought either under the Convention or under the provincial legislation:

I think it advisable, however, to set forth my views on the interrelationship of the Convention and the other provisions of the Act in circumstances such as arose here. As I see it, those provisions and the Convention operate independently of one another. This result appears obvious when an application is made solely under the Convention or solely under the Act. One procedure may provide advantages that the other does not. When a particular procedure is chosen, however, it should operate independently of the other, though where the provisions of the Act are selected it may not be improper to look at the Convention in determining the attitude that should be taken by the courts, since the legislature's adoption of the Convention is indicative of the legislature's judgment that international child custody disputes are best resolved by returning the child to its habitual place of residence; see G. v. G. (Minors) (Abduction), [1991] Fam. Law 519 (C.A.), at p.519; and Black, supra, at pp.290-91. (emphasis added)

[87] Because ss.40 to 45 of the CLRA do not arise in any way in this application, the mother cannot challenge their constitutionality. She is not subject to, or directly affected by, these provisions in this case.

[88] Further, the mother does not claim to have public interest standing to challenge provisions that are not engaged in the application. A party who is not personally affected by a law may only argue that the law violates the constitutional rights of others where he or she can meet the test for public interest standing. The mother does not meet that test: Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236 at 252-253; Hy and Zel's Inc. v. Ontario (Attorney General), [1993] 3 S.C.R. 675 at 690; Canadian Civil Liberties Association v. Canada (1998), 161 D.L.R. (4th) 225 at 234 (Ont.C.A.).

[89] Sections 40 to 45 are in no way engaged in this application. There is no need for the court to address the challenge to ss.40 to 45 of the CLRA. Summary of the Parties' Positions in Reference to the Constitutional Validity of s.46 of the CLRA

[90] The respondent, having served notice of a constitutional question, argues that the section is ultra vires the provincial legislature. It is their position that a province cannot enact legislation to incorporate portions of a federal treaty relating to matters which fall within the exclusive jurisdiction of the federal parliament - in this case the removal of aliens.

[91] Alternatively, the provincial legislature is repugnant to the federal Immigration power under the Constitution Act, which power is paramount.

[92] The A.G. takes the position that the court should not decide the constitutional issues unless necessary to do so; and that it is not necessary to do so in this case. Alternatively, the A.G. argues there is no conflict between the Immigration Act and the CLRA and a Hague order may be made even if a refugee claim has been made.

[93] The position of the Minister of Citizenship and Immigration is that the provincial legislation incorporating the Hague Convention is constitutionally valid. However, an operational conflict with the Immigration Act occurs in a situation where the judge hearing the Hague application does not await the outcome of the refugee determination where a child, who is the subject of the Hague application, is also a refugee claimant and alleges a well-founded fear of persecution in the country to which the child would be ordered returned under the provincial law. As such, this court should await the final determination of the refugee claim before applying the provincial law. If the final determination of the refugee claim is a finding that G. K. is a Convention refugee, then he could not be returned to Hungary as this is prohibited under federal law. Accordingly, there would be no need for this court to embark upon a determination of the Hague application if the refugee finding were positive. If the refugee finding is negative, however, then the Hague application under provincial law could and should be determined. As paramountcy provides the answer, a Charter analysis is unnecessary. Should this court decide that this analysis is necessary, however, then the principles of fundamental justice require that the statutory framework of the Immigration Act be respected.

[94] The applicant takes the position that the first issue is whether the respondent can make a valid refugee claim on behalf of the child. If not, there is no need to determine the issue of this court's power to make an order under Hague. If she is able to make a claim on behalf of the child, it is conceded that this court could not make an order under the CLRA which is in direct conflict with s.53 of the Immigration Act, and article 33 of the Convention Relating to the Status of Refugees (which section prevents the removal of a Convention refugee so found). Further, returning the child without a determination of his refugee status is not a violation of s.7 of the Charter. There is no operational conflict between the Immigration Act and the CLRA. They can operate together.

[95] Finally, argues the applicant, the effect of the respondent's argument that the refugee claim and the Immigration Act is paramount to the Children's Law Reform Act is that the appellant and children achieve immunity through mother's choice of forum; they fall through the cracks of a perceived conflict. It cannot be right that one parent can unilaterally remove children from their home, without the consent of the other, dictating their best interests by the act of abduction. No one parent should have the ability to trump the other parent by choice of forum, whether territorial, juridical, or administrative, such as has occurred here, with this mother's choice to abduct and then her choice to select an in camera refugee claimant process. An interpretation that says that in all cases of refugee claims, the

operation of the Children's Law Reform Act is stayed pending outcome of the refugee claim would have this effect. Is it Necessary to Decide the Constitutional Issues?

[96] Constitutional issues should not be considered if a case can be disposed of on other grounds: Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 97 at 111-112.

[97] The A.G. argues that if the mother is successful in persuading the court under Articles 13 or 20 of the Hague Convention that the child should not be returned to the father's custody, the matter before the court will be fully and finally resolved. In particular, there will be no need for the court to go on and consider the constitutional challenge brought by the mother, and joined in by the federal Minister, to s.46 of the Children's Law Reform Act, R.S.O. 1990, c. C.12 or the mother's challenge to ss.40 to 45 of the CLRA. If the child would not be returned to Hungary, there would be no possible conflict with the provisions of the federal Immigration Act dealing with refugees and refugee claimants. This application would be concluded.

[98] However, the respondent argues that this court is entirely without jurisdiction to make any order with reference to this child, under the Hague Convention, or otherwise.

[99] Further, what if the father is successful? The A.G. submits that as part of an order that the child be returned to Hungary, the court could and ought to make a corollary order authorizing him to withdraw the refugee claim made on behalf of his son. If withdrawn, the refugee claim would die and there would be no potential conflict with the provisions of the Immigration Act. In my view, this position begs the constitutional question.

[100] The jurisdiction of this court is squarely at issue in this application. For this court to make any decision under the CLRA, the jurisdiction to do so must exist.

[101] Accordingly, this court should determine the constitutional issue.

The Paramountcy Issue

[102] The test for determining whether federal legislation is paramount is that of express contradiction. As Professor Hogg stated at page 16-4 of the looseleaf edition of his text, Constitutional Law in Canada "an express contradiction occurs when it is impossible for a person to obey both laws; or, as Martland J. puts it in Smith v. The Queen 'compliance with one law involves breach of the other'". But, so long as compliance with the provincial legislation would not result in a breach of the federal law, then the province would be free to legislate in the area left open by the federal legislature.

[103] The test was summarized by Dickson J., as he then was, in Multiple Access v. McCutcheon, [1982] 2 S.C.R. 161 at 191:

In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes", and the other says "no"; "The same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

[104] In one of its most recent decisions concerning paramountcy, the Supreme Court of Canada has reaffirmed that the express contradiction test is the sole test for determining conflict. In M & D Farm Ltd. v. Manitoba Agricultural Credit Corp, [1999] 2 S.C.R. 961 Binnie J., at pages 984-985, quoted with approval Professor Hogg's explanation that the "impossibility of dual compliance" test must be met for a court to find that there is an

express contradiction between federal and provincial legislation giving rise to the doctrine of paramountcy.

[105] Where Parliament has established a complete code, or has clearly set out a sole or exclusive governing standard for a particular matter, the court may find a direct conflict in operation between provincial and federal legislation where it is impossible to comply with both the provincial provision and the exclusive federal code: Bank of Montreal v. Hall, [1990] 1 S.C.R. 121 at 152-3.

The Text of the Immigration Act: There is No Express Contradiction

[106] The actual text of the Immigration Act must be examined first. A review of each of the provisions relied upon by the mother and the federal Minister satisfies me that there is no express provision that would prohibit this court from making a risk assessment of harm to the child under Article 13 of the Hague Convention, or making a return order to Hungary under Article 12 of the Hague Convention. Accordingly, there is no express contradiction. The provisions of the Immigration Act do not constitute a federal "stop sign" that purports to preclude provincial family law provisions from dealing with the same child for child protection, custodial, and child welfare purposes.

[107] I agree with the submissions of the Attorney General that the provisions in the Immigration Act cannot be interpreted as providing a "complete code" for the determination of all matters relating to an assessment of a child's risk or the enforcement of extra-provincial orders. There is an absence of language in the Immigration Act itself prohibiting other proceedings, or purporting to give refugee claimants a right to remain in Canada against all other laws. The Act deals with the determination of immigration status and does not purport to preclude family law proceedings, the enforcement of extra-provincial orders or the return of a child to his or her country of habitual residence. Not even all persons that are found to be Convention Refugees are given the right to remain, as a number of exceptions are provided in s.4 (2.1) of the Immigration Act.

[108] A person found eligible by a senior immigration officer to claim refugee status is issued a conditional removal order. It will only become effective if the person is found not to be a Convention refugee. That provision only imposes a stay of a "removal order" pending the determination of the refugee claim. However, a removal order is defined in s.1 of that Act to mean a departure order, an exclusion order or a deportation order, which are all orders made by immigration officials under the Immigration Act. The stay in s.49 does not purport to apply to Orders made pursuant to other legislation, such as the federal Extradition Act, the Hague Convention, the Children's Law Reform Act or the removal of a child from Canada following the awarding of custody to one parent in divorce or provincial custody proceedings. Had this been Parliament's intention, it would have drafted s.49 to provide for a stay of removal from Canada "notwithstanding any other law".

[109] The federal Minister submits that ss.28(2), 32.1(6), 44, 45, 46.01 and 49(1)(c) of the Immigration Act provide "a statutory bar against removing eligible claimants from Canada". I disagree.

[110] These provisions deal with the point at which a conditional removal order made against a refugee claimant ceases to be "conditional" and becomes effective. Here too, the Immigration Act is dealing only with its own enforcement provisions. There is no express language used to prohibit a person's removal from Canada under other laws, both federal and provincial, of general application.

[111] It is of significance that the prohibited removal provision in s.53 of the Immigration Act applies only to persons who have been determined to be Convention Refugees. Section 53 provides:

53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless . . . (emphasis added)

Had Parliament intended to extend this broad protection to apply to refugee claimants, it would have used express statutory language to do so.

[112] There is no provision in the Immigration Act that purports to give refugee claimants a "right to remain in Canada". Indeed, ss.4 and 5 of the Act provide to the contrary.

[113] Section 5 (1) of the Immigration Act expressly provides that:

"No person, other than a person described in section 4, has a right to come into or remain in Canada". (emphasis added)

Refugee claimants, not being described in s.4, have no such rights. See: Sinnappu v. Canada, [1997] 2 F.C. 791 at para. 25 (F.C.T.D.)(dismissed at the Court of Appeal for mootness); Irimie v. Canada, [2000] F.C.J. No. 1906 at para.6 (F.C.T.D.); Manassian v. Alberta (Minister of Alberta) (1990), 65 D.L.R. (4th) 744 at 750 (Alta. Q.B.). See also: Canada (Minister of Employment and Immigration) v. Chiarelli, [1992] 1 S.C.R. 711 at para.27.

[114] While the child may, at some future date, be found to be a Convention Refugee, the Immigration Act contains no provision that purports to require other laws of general application that also deal with the refugee claimant to await the outcome of the refugee claim. For example, a child in Canada with two parents who are here on student visas may become the subject of a custody dispute in Divorce Act or Children's Law Reform Act proceedings. The father seeking custody in that dispute may advise the court that he wishes to return with the child to their country of origin. According to the position of the respondent and MCI, were the mother to then unilaterally make a refugee claim on behalf of the child, the mother and federal Minister's position would require the custody proceedings to come to a halt, pending the lengthy refugee determination process. Such a result cannot have been intended in the absence of express language in the Immigration Act to stay all other proceedings dealing with the refugee claimant.

[115] Contrary to the submissions of the Minister, s.69.1(14) of the Act does not deal with whether a refugee claimant can remain in Canada or not. Rather, it deems the refugee claim to be dismissed for a narrow set of persons subject to extradition. The provision only deals with extradition cases where the offence in question is punishable by a maximum term of imprisonment of ten years or more (but does not cover persons subject to less than ten years imprisonment). It is noted that s.3(1)(b)(ii) of the Extradition Act S.C. 1999, c.18, applies to offences with possible sentences of 2 years or more in prison. I cannot accept that persons in this latter category could block extradition merely by advancing a refugee claim. There is no express language in s.69.1(14) that prohibits the removal from Canada of persons by the operation of other laws of general application, both federal and provincial.

[116] Section 80.1 of the Immigration Act gives an adjudicator sole and exclusive jurisdiction over questions of law and fact that may arise, but only "in the course of proceedings that are required by this Act to be held before an adjudicator" (emphasis added). Similarly, s.67 of the Immigration Act only gives the Refugee Division of the Immigration and Refugee Board sole and exclusive jurisdiction to hear and determine claims for Convention refugee status (s.69.1). Again, these provisions deal only with proceedings conducted under the Immigration Act. In my view it does not constitute the type of express language that would be necessary to oust the jurisdiction of a Superior Court to exercise its parens patriae jurisdiction with respect to the custody of a child in family law proceedings, or to exercise any comparable statutory authority. Family Law Status and Immigration Status are Distinct Subject Matters

[117] In any event, even if a refugee claimant can be said to have some kind of qualified "right to remain in Canada" that right is limited in its scope. The right to remain in Canada set out in s.4 of the Immigration Act is concerned with ascribing immigration status to persons. It ascribes rights for immigration purposes, to live, work, and study in Canada. It does not, however, constitute a broad blanket of immunity from all other laws of general application particularly those concerned with child protection and welfare. For example, both s.4(2) of the Immigration Act and s.6(1) of the Charter grant to Canadian citizens a right to "remain in Canada". Yet, Canadian citizen children of dual citizenship, who have been abducted from their country of habitual residence and brought to Canada are not immunized from the application of the Hague Convention, or parallel provincial provisions, and may be ordered returned to their custodial parent in another country.

[118] This distinction between a child's family law status and the child's immigration law status is significant. McIntyre J. of the Saskatchewan Court of Queen's Bench made the following pertinent observations:

Even if there is an issue as to S.R.S.'s rights under s.6(1) of the Charter I am of the view that a return order under the Hague Convention does not infringe those rights. As noted in Cotroni, supra, the core value protected by s.6(1) is with respect to exile and banishment. The rights protected by s.6(1) are not infringed by family law orders relating to the custody or residence of a minor child. Children do not have control over their own residence. They are always subject to the direction of their parents or in the case of parental disputes an order of the Court. While s.6(1) protects a citizen's right to stay in Canada it also guarantees the citizen's right to leave Canada. If a family law order requiring that a child be returned to the United States breached the child's right to stay in Canada, then equally the family law order requiring the child to stay in Canada would breach the child's right to leave Canada. All family law orders that contain any restriction on a child's residence would prima facie infringe one or the other right under s.6(1) and would have to be justified under s.1 of the Charter. If J.S.S.'s argument were correct there would be a substantial restriction on the power of the courts to grant custody to parents who live outside of Canada. If a court order under the Hague Convention directing the return of a child to a foreign country infringes s.6 (1), then so too would court orders giving custody to a parent living outside of Canada. (emphasis added)

J.S.S. v. P.R.S., [2001] S.J. No.380 at para. 19 (Sask.Q.B.)

[119] A parent granted custody over a child in Divorce Act, Children's Law Reform Act or child welfare proceedings may intend to live with the child in another country.

[120] Similarly, in the case at bar, there is no provision in the Immigration Act which requires the negation of a parent's interest. The Immigration Act nowhere states that a

superior court, in exercising its family law jurisdiction, cannot determine whether a parent ought to be permitted to unilaterally make a refugee claim on behalf of a child, or not. When the Senior Immigration Officer in the case at bar concluded that the infant child was "eligible" to make a refugee claim, the record is clear that he did not take into account the other parent at all. The question of whether one parent, on behalf of a child, can commence a legal proceeding that will determine that child's immigration status in Canada is a matter that is within the matter of the welfare of the child. Where two parents cannot agree, a family law court is able to resolve their dispute. The interpretation of the Immigration Act urged by the respondent and the Minister would bar such a determination by a family law court even in an ordinary custody dispute (such as one between the two students in para. 114 above). Clear language in the Immigration Act would be required to countenance such an interpretation. The Immigration Act should be Interpreted in a Manner Consistent with Canada's International Obligations and International Treaties

[121] The Immigration Act should be interpreted in a manner consistent with Canada's international obligations: Baker v. Minister of Citizenship and Immigration, [1999] 2 S.C.R. 817 at para.70.

[122] The Immigration Act should be interpreted consistently with Canada's international obligations as a signatory of the Hague Convention, and in particular, with the requirement in Articles 2 and 11 of that Convention that in order to protect potentially vulnerable abducted children "matters relating to their custody" shall be dealt with expeditiously.

[123] Articles 2 and 11 of the Convention stress that the most expeditious procedures available should be used to reach a decision concerning an abducted child. Indeed, if the judicial authority has not reached a decision within 6 weeks from the date of commencement of the proceedings, Article 11 gives the requested State the right to request a statement of the reasons for the delay. In contrast, the "Immigration and Refugee Board Performance Report" for 1999, indicates that the average processing time for a refugee claim determination by the Board was 11.8 months for fiscal year 1998-99 and, if a claimant makes an application for judicial review, the report states that the Federal Court takes, on average, an additional 12 to 15 months to complete that review.

[124] If the position of the respondent and the MCI were accepted, the practical effect would be to nullify the Hague Convention. Ontario could become a haven for persons abducting their children and seeking to avoid the enforcement of foreign custody orders. By the time a case was returned back to the Superior Court of Justice from the federal tribunal (and the Federal Court) the child could have become settled in Canada, and a court could find, relying on article 13(b), that an order for the return of the child should not be made because to do so would place the child in an intolerable situation.

[125] The Immigration Act should also be interpreted consistently with Article 16 of the Convention, which expressly provides that the host state shall not decide on the merits of rights of custody.

[126] Further, permitting an application to be brought under the Hague Convention in the face of a refugee claim brought unilaterally by one parent, accords with Articles 18 and 35 of the Convention on the Rights of the Child.

Article 18: State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

Article 35: State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

[127] Article 22 of the Convention on the Rights of the Child makes reference to child refugee claimants and requires that they receive appropriate protection and humanitarian assistance. This underscores the fact that when State Parties wish to have a specific provision in an international instrument directly dealing with children who are refugees, or refugee claimants, they have used express language in that instrument. Had the signatories wished to exempt child refugee claimants from the application of the Hague Convention, and parallel domestic legislation, they would have used express language.

[128] Retaining jurisdiction in the Superior Court of Justice is obviously an approach that is consistent with the requirements of the Hague Convention. There is no conflict with the Convention on Refugees, as the term refugee is defined in that Convention as including only those people who have been found to be Convention Refugees. Article 22 of the Convention on the Rights of the Child is clearly addressed. It can hardly be said that conducting a risk assessment before a Superior Court justice denies a child "appropriate protection and humanitarian assistance in the enjoyment of the applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are parties".

[129] Indeed, assessing risk before a Superior Court judge in the course of the Hague Convention application is fully in accord with Article 11 of the Convention on the Rights of the Child which requires State Parties "to take measures to combat the illicit transfer and non-return of children abroad" and, to this end, to "promote the conclusion of bilateral and multilateral agreements or accession to existing agreements".

[130] The Supreme Court of Canada has recently re-affirmed the importance of having resort to international instruments in interpreting the Immigration Act. In Suresh v. Canada (Minister of Employment and Immigration), 2002 S.C.C. 1 at para.59, the court stated:

The provisions of the Immigration Act dealing with deportation must be considered in their international context: Pushpanathan, supra. Similarly, the principles of fundamental justice expressed in s.7 of the Charter and the limits on rights that may be justified under s.1 of the Charter cannot be considered in isolation from the international norms which they reflect. A complete understanding of the Act and the Charter requires consideration of the international perspective.

[131] The court, in Suresh rejected an approach to reading international instruments that permitted a court to ignore one international treaty where its terms clashed with another international treaty. Rather, the court required that the treaties be read as being consistent with each other (see paras.69 to 72). In particular, the court refused to read the Convention on Refugees so as to deny protections provided to all persons by other international instruments. The court concluded at para.72: This negates the suggestion that the provisions of the Refugee Convention should be used to deny rights that other legal instruments make universally available to everyone. (Court's emphasis)

[132] Similarly, in my view, neither the Immigration Act nor the Refugee Convention can be read in such a manner to deny the protection provided by the Hague Convention, and the Convention on the Rights of the Child. Extrinsic Aids

[133] The A.G. argues that the court should consider extrinsic evidence, including evidence of legislative history, travaux préparatoires and communication between signatories leading

up to the execution of the treaty. The evidence in this case reveals a total lack of discussion concerning an exemption or exception being applied to the Hague Convention in cases of children seeking refugee status. That lack could support an interpretation that the signatories were satisfied that the Hague Convention dealt fully and adequately with child refugee claimants in that Article 13 addressed the risk of harm and intolerable conditions and Article 20 dealt with concerns of fundamental human rights.

[134] In this case, however, given the history in Canada, the silence may not be significant. Canada signed the Hague Convention in 1980, prior to the surge in refugee claimants in the 1980's and 1990's, and prior to the Supreme Court decision in Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177, which held that people claiming refugee status were entitled to the procedural requirements of fundamental justice.

The Immigration Act Should Not be Interpreted so as to Usurp the Parens Patriae Jurisdiction of a Superior Court Judge

The Jurisdiction of this Court over Children

[135] It is trite law "that in all questions relating to the custody of an infant, the paramount consideration is the welfare of the infant". Further, if an infant is within the territorial jurisdiction of this court, he is entitled to the protection of this court and therefore "entitled to the special protection owed by the King as parens patriae to infants": McKee v. McKee, [1951] 2 D.L.R. 657 at 661 (Privy Council).

[136] In McKee, one of the questions for the Privy Council to decide was whether the Ontario trial judge was correct in undertaking a full trial to determine the best interests of the child and in making a custody order in the face of a pre-existing valid California custody judgment. The Privy Council held that it was within the discretion of the trial judge to do; as it would have been within the discretion of the trial judge to attach such weight to the foreign judgment that it prevailed. If it did the latter, the court, having assumed jurisdiction, was not abdicating it, but rather in the exercise of its jurisdiction, determined such a course was for the benefit of the infant: McKee, p.665.

[137] The problem of international parental abduction of children progressed in the years subsequent to McKee.

[138] Several decisions in the Ontario Court of Appeal reflected the developing approach to the issue. The jurisprudence established that the child should be returned to the state of its habitual residence, where custody issues could then be determined, without a custody determination in Ontario, unless there was a serious risk of harm to the child in doing so: Charmasson v. Charmasson (1981), 34 O.R. (2d) 498 (C.A.); Re Loughran, [1973] 1 O.R. 109 (C.A.); Re Ridderstroem and Ridderstroem, [1972] 2 O.R. 113-114 (C.A.); Re Neilson v. Neilson (1971), 16 D.L.R. (3d) 33 (Ont. H. C. J.); Heslop v. Heslop, [1958] O.R. 183 (C.A.).

[139] The Hague Convention and s.46 of the CLRA confirm and continue this approach.

[140] Whether exercising its jurisdiction under the Hague Convention or under its general jurisdiction to protect the welfare of a child (or in given cases under ss.40 to 45 of the CLRA), this court, in making an order that a child be returned to its habitual residence without a determination of the custody issue, is making an order considered to be in the best interests of the welfare of the child.

[141] This jurisdiction is clearly one of provincial power under the Constitution Act.

[142] This jurisdiction has been inherent in this court for over two centuries. Absent clear statutory language to the contrary, a provision should not be read as modifying or impairing that jurisdiction: C.B.C. v. Quebec Police Commission, [1979] 2 S.C.R. 618 at 647; Black v. Canada (Prime Minster) (2001), 54 O.R. (3d) 215 at 238-239 (C.A.); Fournier v. Fournier (1990), 71 O.R. (2d) 758 at 771 (Dist. Ct.); Kunkel v. Kunkel (1994), 111 D.L.R. (4th) 457 at 473 (Alta.C.A.) and Ramsay v. Ramsay (1976), 70 D.L.R. (3d) 415 at 428 (Ont.C.A.).

[143] The Superior Court of Justice has inherent jurisdiction to deal with children brought into Ontario from other countries. Under conflict of laws principles, the Superior Court also has the power to recognize the jurisdiction of the court in the country of the child's habitual residence, including orders of that court and remitting custody determinations to that court. The effect of the position of the respondent and the MCI is that both of these powers must be held in abeyance pending the final determination of the refugee claim. This could prohibit the exercise of the Superior Court's jurisdiction for years.

Proceedings Under the Hague Convention are Fully Consistent with the Principles of Fundamental Justice

[144] A hearing before the Superior Court of Justice pursuant to the Children's Law Reform Act and the Hague Convention is fully consistent with the requirements of procedural fairness and the principles of fundamental justice. The Supreme Court of Canada has held that a parental interest in custody of their child is protected under the right to "security of the persons" in s.7 of the Charter. Proceedings in the Superior Court of Justice protect fundamental parental interests and the interests of children by expressly providing for the representation of both of a child's parents.

[145] The interpretation of the Immigration Act that best accords with s.7 of the Charter is an interpretation that allows for a consideration of the parent's security of the person right. An interpretation that allows a family law court to exercise its jurisdiction to hear an application under the Hague Convention or the CLRA, where representations can be made by the child, the mother and the father, is consistent with the Charter.

[146] Furthermore, I ask, what of the s.7 Charter rights of this child? Singh gives him those rights. In my view, his security of the person rights include the right, subject to an appropriate qualifying court order, to have full opportunity of being cared for and reared by both his parents whether they are separated or not. I go further. The security of the person rights of a three year old child must include the right to not be denied that opportunity without both of his parents being given status in, and the right to participate fully in, a proceeding which may affect or deny the child that opportunity.

[147] The respondent submits that the return of the child would be a violation of her s.7 rights because she has made a refugee claim on his behalf. It is the applicant's position that in a case involving minor claimants when there is a dispute over custody and where both parents have equal custodial rights, the mother has no legal right to make any decisions on behalf of the child without the consent of the father or the authorization of a court of law. In this case, the father has an order for custody in Hungary. There is no legal reason to conclude that her wishes should take precedence over the wishes of the father in any matter, including the asserting of a claim to refugee status on behalf of the child. Both parents had custody of the child at the time of the abduction in accordance with Hungarian law and at this time the father has custody pursuant to a valid Hungarian court order.

[148] To accept that one parent has a unilateral right to assert a refugee claim would invite any parent involved in a custodial dispute in another jurisdiction to come to Canada and assert a claim to refugee status on behalf of the child. Once the claim is commenced, the

Canadian courts would be unable to intervene, the jurisdiction of the foreign courts would be undermined and the refugee claim would have to be allowed to continue until a determination were made, whether or not the refugee claim were in good faith, bogus, strategic or otherwise. To coin the language cited in Thompson v Thompson, such an interpretation would drive a coach and four through the Convention and the CLRA, which implements it.

[149] The principles of fundamental justice are fully satisfied in this hearing before the Superior Court of Justice under the Hague Convention. To interpret the Immigration Act as prohibiting such a hearing from taking place, pending the refugee claim, would be inconsistent with the principles of fundamental justice as the rights of one of the custodial parents would be ignored.

[150] For these reasons, the constitutional question is dismissed. Section 46 of the C.L.R.A. is not impaired, qualified or rendered inoperative by the Immigration Act under the doctrine of paramountcy.

The Merits of the Hague Application

[151] The evidence on this application is not viva voce, but rather is by way of affidavits, written statements attached thereto, and transcripts of cross-examinations. As the following review of the evidence discloses, the risk assessment required to be undertaken by this court is not made easy when serious issues of credibility arise in the case of both parties and their witnesses.

[152] Article 12 of the Hague Convention provides:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

Article 3 provides:

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

[153] The evidence establishes that the removal and retention of G. was wrongful. Both his parents had equal custody rights and equal rights to determine the place of residence of the child. The retention in Canada is in breach of the father's custody rights.

[154] Nevertheless, by reason of article 13(b), this court is not bound to order the return of the child if the respondent 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.

[155] The return of the child may also 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. (Article 20)

[156] I have above determined that the return of the child would not be a breach of Canadian fundamental principles relating to the protection of human rights and fundamental freedoms.

[157] I turn then to the question whether there is a grave risk that returning G. to Hungary would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

[158] As indicated briefly above, the respondent's case is that she separated from the applicant and left Hungary with the children because of the physical, sexual and psychological abuse inflicted upon her by the applicant and the physical abuse inflicted upon G., and because the Hungarian state was unwilling or unable to protect her from the applicant.

Respondent's Allegations of Abuse

[159] The respondent lived with the applicant for about three years before marrying him in 1991. In her affidavit she states that during this period of time the applicant violently abused the respondent. To escape his abuse she fled to Belgium with AN. N., her daughter from a previous marriage.

[160] Following the respondent's return from Belgium the applicant was extremely violent and beat her severely, in addition to abusing her verbally, because she had run away to Belgium.

[161] Following their marriage in September 1991 the applicant would become violent towards the respondent with severe beatings, kicking her while she was on the floor, choking her, raping her and other forms of abuse. The respondent sought the help of police at various times but they refused to act saying it was a family problem and not their concern.

[162] In or about 1995 while the respondent and applicant were living in Mohacs, Hungary with the respondent's half sister V.E., the applicant was violent towards both the respondent and her half sister. On occasion while the half sister was squatting he kicked her twice from behind her back. He also kicked the respondent and hit her by hand on several occasions. On one occasion, the respondent, her half sister, and her daughter AN. fled from the house. The police were called and the applicant was taken away and detained for one night or so.

[163] In 1997 when the respondent was pregnant with G. the applicant discovered that the respondent was a Gypsy. Because of this, the applicant beat the respondent. She gave birth to G. in her eighth month at 36 weeks gestation with a birth weight of 2600 grams.

[164] When G. was six months old the respondent was severely disabled for about a week from another beating. She was holding the infant G. at the time. On another occasion the applicant was sitting across from the respondent at a kitchen table. With his fist he smashed her so hard in her face that there was a large gash around her eye and the skin was split. She required stitches and a tube was implanted. The applicant weighs about 100 kilograms; the respondent is diminutive.

[165] The respondent alleges that the applicant's abuse of the respondent continued after they moved to a remote forest location in Tata, Hungary in April 1999. In November 2000 the applicant beat the respondent severely and also pushed G. downstairs.

[166] The applicant also beat the respondent's daughter AN. AN suffered nightmares due to the physical abuse of the applicant.

[167] In the course of these proceedings the respondent has received a message through a third party, from the applicant, threatening her and the children with physical violence and mutilation.

The Response of the Applicant

[168] The applicant denies all of the respondent's allegations of abuse.

[169] The respondent alleges that after living with the applicant for three years, she fled to Belgium in 1991 in order to escape his alleged abuse. After a short time she returned to Hungary and married the applicant. The applicant says that the reason the respondent went to Belgium was because she wanted the applicant to marry her and, in fact, he did do so upon her return. The statements of the applicant's friend, GG. K. and his wife Z. substantiate the statements of the applicant. There is no evidence filed by AN.'s father, T.N., who is said to have personal knowledge about the alleged escape to Belgium and who is presently in contact with AN. The respondent says that she fled with the help of friends but there is no evidence tendered by anyone attesting to any abuse precipitating a flight to Belgium.

[170] In reference to the allegation that the abuse escalated in 1997 when the applicant found out she was a Roma, the applicant notes that they had been married since 1991 and had lived together for three years prior to that. The respondent admits that he knew her family since 1987. One of the Respondent's relatives is the head of the Hungarian Gypsy Minority Self-Government and is well known to the applicant. This relative has always maintained a high profile in the Roma community. At one time the parties lived in Mohacs, Hungary with members of the respondent's family who were openly of Roma decent both in their cultural identification and physical appearance. The applicant states that he always knew her racial origins.

[171] The applicant states that, in 1996 the respondent abandoned the applicant and went to Italy. She left her daughter with another family. Although the respondent says she again ran away because of the severe abuse, her flight to Italy was never mentioned by her in her sworn affidavits until the applicant raised this issue in his materials.

[172] As to the allegations of abuse during pregnancy, the statement of her attending physician Dr. Rokay Laszlo dated July 21, 2001 asserts that the child was full-term and that he did not find any evidence of abuse.

[173] There is no independent medical evidence produced by the respondent to support her allegations.

[174] The evidence of the respondent's younger half sister, V.E. ("E."), is that she lived with the applicant and respondent for six months around 1995 and had witnessed assaults by the applicant. However, she gives no dates, times or places for these occurrences and few specific details of the events. AN. was supposed to have witnessed this attack but made no mention of it in her affidavit. E. states that E.'s godfather called the police after the assault but his name was not divulged until cross- examination, when it was learned that E.'s godfather is I.K., who has given evidence on behalf of the applicant. I.K. denies any knowledge of any abuse and states that the family at Mohacs would have known if there had been any. E. was living in Canada when she swore the affidavit but was not produced for cross-examination, as it is said that she moved back to Hungary. The applicant denies that E. ever lived with them. He

denies the assault and the alleged incarceration. The criminal records tendered by the respondent herself do not indicate any record of this alleged incarceration. The applicant's position is that the deponent made this affidavit under the influence of her sister. There are many allegations in the applicant's material that the respondent has asked numerous people to lie for her. I.K. (the son of I.K.) has sworn that he too was asked to lie for the respondent. He also states that E. had told him that she was asked by the respondent to give false evidence. There are no police or medical reports tendered with respect to the serious incident alleged by E. No further requests were made to E. to obtain further evidence to substantiate the respondent's evidence although she was returning to Hungary where the evidence would have been readily available.

[175] AN. has sworn that she and a neighbour had to take care of her mother after an abusive incident in which she states that her mother could not get out of bed for a week. There are no details of the assault, no details of the injuries, nor of the time and place they occurred. The neighbour's name is not given and there is no substantiation from the neighbour about this serious allegation.

[176] The respondent states that the applicant began beating AN. in December 2000 and that this was why she decided to leave Hungary. On the other hand, the Toronto doctors who have sworn affidavits were told the abuse of AN. had been going on for years.

[177] It was in 2000 that the applicant applied, with the support of the respondent to adopt AN., a process that was not completed. T.N., AN.'s father, had consented to the adoption. No allegations of abuse were tendered in that proceeding.

[178] In reference to the allegation that AN. was having problems in school, due to the fact that she was a Roma and that this factor escalated the abuse against the respondent and her daughter, AN.'s teacher, H.Z., filed a statement contradicting the respondent.

[179] The respondent states that her own family assisted her in escaping from Hungary, yet not one person who allegedly assisted her has tendered evidence in this proceeding. The respondent's own relatives have filed statements on behalf of the applicant. The applicant has stated that the respondent has attempted to get her family to lie on her behalf without success. Except for E., the respondent's family is supporting the position of the applicant. The respondent states that she has not asked her relatives to support her as this would make them targets and put them in danger. The relatives of the respondent deny this.

[180] Neighbours are said to have known about the abuse and allegedly assisted the respondent when she was injured, yet a local police statement indicates that neighbours did not know about any problems. No neighbours have tendered evidence. There is in fact not one neutral independent witness to any assault, or to injuries suffered by the respondent. In her cross-examination she stated that the neighbours are not coming forward because they are owed money from the applicant.

[181] There is not one medical report from Hungary to corroborate the evidence of the respondent in spite of the fact that she says she was once in bed for a week and another time had stitches. There is no evidence of any attendance at any hospital and no medical or hospital report filed. There is no report from any counsellor or doctor to whom she spoke about the abuse. The respondent has made no requests to obtain any medical evidence from Hungary.

[182] The respondent has filed no police report from Hungary although she says she made reports in three different cities. She states that she was either afraid to make written reports at the police station or else they did not take reports, but there is not even a report about the

alleged incarceration of the applicant because of the assault referred to above. In her affidavit material the reason given for her not having the police involved was that they treated it as a domestic matter and would not help. This was contradicted in her cross-examination when she stated they would have responded and given him a fine or small punishment but she would face repercussions from the applicant. The reason she gave for not requesting police reports for this proceeding is that she has not the funds to do so, although she has obviously incurred considerable expense securing information about the criminal record of the applicant back to 1990.

[183] No photographs or any other physical evidence were produced to substantiate the years of severe beatings she describes; nor was there evidence of any attempts to obtain such evidence.

Medical Evidence

[184] The respondent took her children to physicians in Toronto. G. and AN. have been seen by a pediatrician, Dr. Maria Torok who referred them to a psychiatrist, Dr. Leslie Kiraly. Concerning AN., Dr. Torok reports that AN. was complaining about nightmares and that the applicant had hit AN. in the face and on her buttocks several times. AN. described the applicant as being "very unpredictable, one minute kind and the other shouting and hitting". AN. reported witnessing the applicant beat the respondent with his fists and kick her when she fell down, and that this occurred several times even when the respondent was holding G. in her arms. AN. also reported that the applicant had hit G.'s hand several times leaving bruises and finger marks. Dr. Torok referred AN. for psychiatric assessment because of the psychological damage that she suffered from the applicant's abusive behaviour.

[185] Dr. Kiraly, a psychiatrist, saw AN. on Dr. Torok's referral. He diagnosed her as having post-traumatic stress disorder and family problems and was of the opinion that there is very little doubt that she has been a victim of physical and emotional abuse. He reports that being forced back into the abusive household with the applicant would be very destructive for AN.

[186] Dr. Torok also saw G. and communicated with him in Hungarian. G. showed Dr. Torok where the applicant had hit him on the hand. Because of concerns that the applicant had sent someone to Canada to try to take back G. to Hungary, Dr. Torok discussed the case with a Children's Aid Society worker. She also referred G. to Dr. Kiraly.

[187] Dr. Kiraly saw G. on September 24, 2001. In Dr. Kiraly's opinion, being forced to return to Hungary to the applicant would be devastating for G. He reports that G. "has a close relationship and attachment with the mother and sister but the history suggests that there is no relationship with the father. Being ripped away from his family to return to an abusive, possibly psychopathic man, would destroy this child".

[188] I note that any information underlying the opinions expressed by the physicians comes only from the respondent or AN. If the facts recited to the physicians are not true, then obviously the opinions are of little force. I also note that AN. made allegations of abuse to the physicians that go far beyond what is contained in her affidavits. The respondent was not herself examined by a doctor or psychologist. No psychological testing was undertaken.

[189] There is evidence tendered with respect to the moral character of the respondent. There are allegations that the respondent lost custody of her eldest son, Attila and she has no relationship with him at this time. The applicant and other witnesses have said that it was known that the respondent was a prostitute and had a criminal record for robbery. The respondent has not been willing to produce her criminal record from Hungary. There is a

further allegation that she prostituted again in 1996 and got involved with drugs at that time. R.H. has sworn an affidavit stating she admitted this to him. Members of her own family have said that they have come to know the respondent as a pathological liar.

[190] There are allegations that the mother is emotionally unstable. There are allegations that she has said that she would kill the child rather than return to Hungary.

[191] The respondent states that she knew nothing about the Hungarian custody order, but the court record shows that the respondent was represented in the Hungarian proceedings. There was no appeal of the order by her. There have been no efforts to set aside the custody order. The "legal representatives" of the applicant, Dr. Peter Zoltan O. and Dr. Andrea Bakos indicate that there would have been an investigation with respect to the allegations of abuse and the status of any outstanding criminal matters, during the three months prior to the order for custody. Prosecutors and guardianship authorities were involved at the time. No records of any allegations of abuse were produced. Specifically there was no record of abuse with the family doctor, Dr. Agnes Bognar. The statement of the lawyer in the custody matter, Dr. Andrea Bakos, confirms this.

[192] To this point in the review of the facts, one has observed a maze of allegations, counter-allegations, responses and counter-responses.

[193] But the factual maze is even more convoluted. Evidence Concerning Criminal History of the Applicant

[194] Much of the following information is provided by the affidavit evidence of T.K. who identifies himself as a lawyer who is qualified to be and is practising in Hungary. He has searched the records in Hungary and provides copies of same. What follows reflects the evidence before this court on the hearing of the application on January 28, 29 and 30, 2002.

[195] The applicant is a repeat criminal offender in Hungary and has a lengthy criminal record dating back to offences as early as March 1, 1981. An outline of those offences follows.

[196] On October 17, 1986 the applicant was sentenced to five years and six months in jail, three years' prohibition from public business and three years' driver's licence revocation by the Budapest Military Court for several frauds and other crimes. The offence date was March 1, 1981.

[197] On March 17, 1988 the applicant was sentenced to four months in jail and prohibited from public business for one year by the Budapest Central District Court for the crime of theft. The offence date was August 1984.

[198] On May 20, 1988 the applicant was convicted for crimes against property in the Budapest Military Court and sentenced to five years and seven months and prohibited from taking part in public business for three years. This conviction relates to the aforesaid two earlier convictions.

[199] A charge of embezzlement was brought against the applicant in the Budapest Side District Court. According to the applicant he was admonished by the court and obliged to bear the costs of the proceeding. According to the respondent's witness, T. K., the applicant was convicted and fined in 1999.

[200] The applicant was convicted of ruffianism in a case arising in the Pest Central District Court. According to the applicant the proceeding at First Instance was stopped on October

14, 1999 with the court admonishment and he was obliged to bear the costs of the proceeding, but this was reversed by the Budapest Court of Appeal which convicted and fined him. According to the respondent's witness T.K. there was a conviction at First Instance which was affirmed at the Second Instance in the City Court on September 29, 2000. Between these two decisions the applicant was convicted on May 5, 2000 on other charges of being a repeat offender and sentenced to two years as described in the paragraph following. The September 29, 2000 decision of the appellate court on the ruffianism charge stated, among other things, "In the current case however, none of the cited conditions are met, in that the meagerness of the danger this crime poses to society cannot be adequately argued and even less plausible is the idea that it will cease. The accused, a repeat offender, had also caused vandalism with his crime." The indictment with respect to ruffianism states that the applicant was in custody from April 16 to 20, 1994, then until August 11, 1994 was under preliminary arrest. The translated indictment recites, among other things: In the beginning of April 1992, M.K. and G.K. decided, that for the purposes of committing further crimes, they will form a corporation. They will create the contract of incorporation, a stamp and will buy product on credit to be paid by money transfer, then not pay the amount owed, and sell the product.

M.K. asked his brother-in-law, L.B. – who lived in Mohacs – to give his name for the incorporation contract for the company. According to his statements, this was necessary, because he has a police record.

As a security deposit for the loan, they prepared a contract for the sale of M.K.s' house in Pilisvorosvar, whereon the stamp of the certifying lawyer was forged by means of a customizable stamp and the signature too was falsified.

[201] In 1997 the applicant was charged in the II and III Budapest District Court for being a repeat offender. He was convicted and sentenced to two years imprisonment on May 2, 2000. On April 25, 2001 the decision of First Instance was affirmed. According to the applicant he has served the entire sentence. According to the respondent's witness T.K. he does not believe that the applicant has served the entire sentence and it is likely that there is an outstanding Hungarian warrant for his arrest to serve the balance of the sentence. According to the verdict, the applicant had been held in custody from September 2 to 4, 1992, and from January 28, 1994 to July 25, 1995 he had been held in preliminary confinement. He was found guilty on 22 counts of which one was an instance of serious bodily harm as a co-perpetrator. The remaining 21 counts were as follows:

- 2 instances of conspiracy and fraud committed under the guise of business causing substantial damages committed as co-perpetrator.

- 4 instances of fraud committed under the guise of business causing substantial damages, in which in 2 instances he was co-perpetrator and in 2 instances instigator.

- 4 instances of conspiracy and fraud committed under the guise of business causing greater damages, in which he was in 3 instances co-perpetrator.

- 5 instances of fraud committed under the guise of business causing greater damages, in which he was in one instance co-perpetrator, in 2 instances instigator, and in one instance attempted.

- 2 instances of the crime of fraud.

- 1 instance of the crime of forging public documents.

- 3 instances of forging personal documents.

The applicant was also ordered by the court to pay to various persons and businesses either individually or jointly amounts totalling in excess of ten million Hungarian forints plus interest thereon at 20% per year from various dates commencing between 1991 and 1994, the total amount being between 20 and 30 million Hungarian forints, i.e. $80,000 to $120,000 (U.S.). The sentence recites that the applicant's monthly income is about 300,000 Hungarian forints. Even if the applicant were to pay that entire income towards these debts, it would take him around six to eight years to pay them off.

[202] At the time of the hearing in this court, there was currently pending in the II and III Budapest District Court a charge of fraud and other criminal acts against the applicant and three co-accuseds. These criminal acts are said to have been committed in January 2000 shortly after sentences were handed down to the applicant in 1999 on the embezzlement and ruffianism charges, and while the repeat offender charges were still pending. The charge pending against the applicant was said to potentially draw a prison sentence of from two to eight years. The supervising judge in that proceeding is Dr. Miko Gergely Pal. Dr. Miko had issued an international warrant for the arrest of the applicant in that case and had ordered the confiscation of his passport. That order was made on May 16, 2001 less than a month after the conviction for being a repeat offender was affirmed on appeal on April 25, 2001. By order of June 14, 2001 of the City Court sitting as a Court of Appeal, the order for preliminary arrest and passport confiscation appears to have been set aside. In its reasoning the Court of Appeal referred to the fact that the applicant was supporting his two minor children, presumably referring to AN. and G. However, by that time they were no longer in Hungary but rather were with the respondent, and the applicant was paying no support for them. On or about August 1, 2001, the Hungarian Ministry of the Interior, which is responsible for the issuance of passports in Hungary, informed the II and III Budapest District Court in the fraud proceeding currently pending against the applicant, that the applicant's passport which had previously been taken from him could not be returned to him in view of the fraud charge pending against him. The applicant provided a photocopy of his passport but it is questionable since it appears to be dated June 1, 2001, at a time when the confiscation order for his passport was still in effect.

[203] The applicant was to appear in court in Tata, Hungary on November 5, 2001 on criminal charges against him. As well, the applicant failed to appear before Judge Miko on September 14, 2001 in the II and III Budapest District Court and a new date was scheduled in November 2001 for him to appear in those criminal proceedings against him.

Material Submitted by the Applicant

[204] The applicant has submitted to this court a one-page statement purporting to be by I.K., leader of the Hungarian Gypsy Minorities' Self Government. The signature of I.K. on that statement is clearly not that on two later notarized statements of I.K. dated November 5 and 12, 2001 submitted by the applicant. The signature on the July 16, 2001 statement is also clearly different from three statements dated March 26, 2001 signed by I.K. under seal of the Gypsy Minorities' Self Government Organization at Mohacs.

[205] The applicant has failed in this court and elsewhere to reveal his entire criminal record. In a July 23, 2001 statement made at the Hungarian Ministry of Justice he admitted only to being condemned in March 1981 for causing a negligent traffic accident, and in 1983 for fraud, but not for aggressive action. On further questioning by the Ministry of Justice's officer on July 25, 2001 he admitted to being condemned for fraud in May 2000 by the II and III Budapest District Court. He failed to mention the convictions for embezzlement and

ruffianism, and his conviction in 1988 when he was sentenced to five years and seven months imprisonment. He also failed to mention the current criminal proceedings against him. He denies being condemned for causing bodily harm yet the evidence shows that on May 2, 2000 he was found guilty, among other things, of one instance of serious bodily harm as co-perpetrator as described above.

[206] The applicant denies that there are further criminal proceedings against him in the Tata Court under file number 5.B307-1999 and claims that that proceeding was converted into another one numbered F242000/7, that he was not the accused but the injured party and it was he who initiated that criminal action. This is contrary to the decision of the Office of the Public Guardian in the adoption proceeding brought by the applicant concerning AN. N. dated October 3, 2000. That decision states that the adoption proceeding is suspended "until the legally binding conclusion of criminal proceedings number 5.B307/1999 at the City Court of Tata". The decision further states that the Office of the Public Guardian has official knowledge about a criminal procedure against the applicant, being the person intending to adopt AN., and that "this fact was confirmed by the Criminal Investigation Unit of the Police Station of KEM (presumably stands for Komaron Esztergom County) as well as by the City Court of Tata".

[207] The applicant made statements dated July 23, 2001 and July 18, 2001 in which he stated that "If G. were to return to Hungary he would return to his regular environment/toys, his room". The applicant submitted pictures of their residence in Tata, Hungary showing, among other things, a child's room with toys. However the applicant has moved from the house in Tata taking all the furniture. The address he has shown on documentation submitted in support of his application in this court is that of his mother which he claims is also his.

[208] The applicant filed statements in this court by GG.K. Their reliability can be questioned as GG.K. has a criminal record as a co-accused with the applicant. There are numerous inconsistencies in the statement of GG.K. and Z.K. dated July 16, 2001 when compared to various court documents. Specifically, GG.K. has been convicted for causing clinical death by traffic accident. He was also found guilty on May 2, 2000 together with the applicant and sentenced to one year and three months imprisonment for nine counts of conspiracy and fraud under guise of business causing substantial damage, eight counts of conspiracy and fraud under guise of business causing greater damages, one count of fraud committed as instigator, and one count of the crime of embezzlement. In sentencing him the court recited that he was, among other things, single and lived with his grandfather. He had been previously sentenced on January 15, 1990 for theft and received a sentence of two years and ten months of suspended imprisonment. It is further stated in the conviction that GG.K. was married to one E.G. in February 1992. These facts are inconsistent with the statement dated July 16, 2001 of GG.K. in which he describes his wife as someone other than E.G. who signs her name as Mrs. J.G. GG.K. was returned to jail in the summer of 2001 and was only recently released. Living under poor financial circumstances he asked the applicant to look after him and his family while he was in jail. GG.K. is not an independent witness in my view.

[209] The applicant has submitted statements by one P.O. dated July 16, 2001 and November 8 and 12. 2001. He is a disbarred lawyer who, according to the respondent, used to forge the applicant's notarized legal documents for dealing with banks, and he is also a suspect in several other incidents of fraud with the applicant. He failed to appear when summonsed by Judge Miko in the current proceedings against the applicant in the II and III Budapest District Court. The respondent has met O. a few times when he came to visit the applicant on "business matters". The respondent denies O.'s statement that the respondent

told him that she called the applicant and asked him to give her 5,000,000 Hungarian forints if she returned to Hungary. The respondent says she never spoke to him.

[210] Allegations by the applicant and statements from others on his behalf that the respondent called them demanding 5,000,000 Hungarian forints from the applicant in order to return are strongly denied by the respondent. Evidence Tendered Following the Hearing of the Application

[211] On February 7, 2002 counsel for the respondent faxed a letter to this court indicating he had fresh evidence which he wished to have the court consider. The evidence to be produced would indicate that Mr. K. had been convicted of fraud, in absentia, in Hungary, on February 6, 2002, and had been sentenced to six years imprisonment without parole, and that there is an outstanding warrant for his arrest. Counsel was advised by the court to bring a motion if he wished.

[212] Counsel for the applicant responded to this development by forwarding an affidavit, in a sealed envelope, directly to the court, without obtaining leave to adduce fresh evidence. A flurry of activity and filing of material continued. The motion to adduce fresh evidence by the respondent, and further reply material from the applicant, was made by way of a motion in writing.

[213] Not withstanding the unusual manner in which these materials were proffered, I received, read, and allowed into evidence all of the material because of its urgency and importance. The following is what it contains.

[214] An affidavit of R.H. translating two documents from Hungary, filed by the applicant. One document purports to be a letter from a department head at the Police Headquarters of Budapest dated February 9, 2002. It states that there is no arrest warrant in the Hungarian registry nor in the registry of international authorities for the applicant. Further, there "is no ongoing criminal proceedings" against the applicant.

[215] The second document is a letter dated February 8, 2002 purportedly from the Secretary of the National Bar Association of Hungary stating that "there appears no lawyer by the name of Dr. K.T. in the registry of the National Bar Association" and only bar members can operate as lawyers – in effect that Dr. K. is not a lawyer in Hungary.

[216] The respondent then filed her motion and fresh evidence. It included a letter from the Hungarian Society of Barristers dated February 22, 2002. The letter states, in summary, that the earlier letter furnished by the applicant, concerning Dr. K. not being a lawyer, is a fraudulent document. The letter goes on to say that Dr. K. is, in fact, a fully qualified member of the Bar of Hungary. This letter states that the earlier above referenced letter is "unquestionably a forgery and was not issued by the Hungarian Society of Barristers". This letter is signed by the President and Chief Secretary.

[217] The material also includes an affidavit of Dr. K. confirming that he was present in court at the trial of the applicant on February 6, 2002 when Mr. K. was tried in absentia. Dr. K. swears that the applicant was convicted of six counts, all fraud related, and was sentenced to six years in prison without parole. Further, that as a result of an arrest warrant outstanding for him since July 6, 2001, Mr. K. cannot legally leave Hungary.

[218] A further affidavit, is that of Dr. Z.P., law clerk, in which the witness swears that he is a candidate to become a Hungarian lawyer, works for Dr. K., was present with him in court on February 6, 2002, and confirms the evidence concerning the conviction and sentence.

[219] In a further affidavit of the respondent, she swears on information and belief from Dr. K. that the applicant well knows that K. is a lawyer because he, K., represented a co-accused of the applicant in a criminal proceeding. A document previously filed confirms him so acting for the co-accused in a proceeding in which the applicant is accused.

[220] Finally, in response to this evidence filed by the respondent, the applicant filed an affidavit indicating that his counsel had requested information by e-mail on February 8, 2002 to the "Ministry of Justice, International Law Division" in order to get information "from the Central Authority for the Hague Convention" in Hungary with reference to any outstanding criminal matters related to Mr. K.

[221] On March 1, 2002, Dr. Tunde Forman, legal counsel for the Central authority in Hungary, advised by e-mail to the applicant's counsel that there was no new judgment against Mr. K. She forwarded a copy of a letter "from the Penitentiary Office" confirming this information.

[222] In a further affidavit sworn by the applicant on February 28, 2002, he denies the conviction of February 6, 2002 and denies he is a fugitive from justice. He says he attended at the police station to confirm that there is no warrant for his arrest. He says he was the one who obtained the letter from the Hungarian Society of Barristers to the effect that Dr. K. is not a lawyer.

[223] The applicant says he is not in hiding and is well known in Hungary because of the publicity that this case has generated. He reiterates that he is content that G. remain in his mother's care pending further court order, in Hungary.

[224] In a further affidavit filed on behalf of the respondent and dated March 5, 2002, there was annexed as an exhibit, a faxed letter from Dr. K. which also attached a purported five-page extract from a judgment of a Hungarian court dated February 6, 2002, indicating that the applicant was in fact convicted and sentenced to six years imprisonment.

[225] Faced with the absolute conflict in this evidence, I convened court, and after hearing submissions from all counsel on March 5, 2002, I ordered counsel for the MCI and counsel for the A.G. to make a joint request of the Canadian Federal Central Authority for the Hague Convention, to take the most effective steps available to determine from neutral and authentic source(s) in Hungary, whether the applicant was so convicted and sentenced on February 6, 2002, whether there is an outstanding warrant for his arrest, and whether the judgment respecting the conviction (to be provided by respondent's counsel) is authentic, by confirming same with the relevant Hungarian court.

[226] The order of March 5, 2002 was promptly complied with and the request was made.

[227] By letter dated March 21, 2002, which was faxed to this court on March 22, 2002, the Ministry of Justice, Department of International Law, Budapest, Hungary, advised the Attorney General for Ontario that the judgment was authentic and the applicant had been sentenced to six years in prison. There are, as well, outstanding warrants for the arrest of the applicant out of Tata Municipal Court and another out of Budapest court (5th District), both for fraud.

[228] Neither the Ministry of Justice in Hungary, nor the court in Budapest which convicted him, are aware of the whereabouts of the applicant.

[229] His conviction and six-year sentence have thus been established in evidence from independent, reliable sources.

[230] This casts serious doubt on the validity of I.K.s' written statements (probably false documents) and the purported letter from the Hungarian Bar Association to the effect that Dr. K. is not a member of the bar of Hungary (on the evidence, a false document). These documents were obtained by, and proffered in evidence by, the applicant. These circumstances, and the points made above concerning the reliability of the evidence proffered by the applicant, lead me to conclude that the evidence tendered by the applicant is, in essential matters, not trustworthy.

The Law

[231] As above noted, the onus is on the respondent to establish one of the defences available to prevent the return of G. to Hungary: Parsons v. Styger, (1989) 67 O.R. (2nd) 1 (Sup. Ct.), (1989) 67 O.R. (2d) 11 (C.A.)(affirmed).

[232] The risk contemplated in the Convention has to be more than an ordinary risk and must not only be a weighty one, but it must be one of substantial and not trivial harm. Thompson v. Thompson, supra. The standard of proof is on a balance of probabilities, but there must be "considerable evidence" to meet the grave risk test. Pollastro v. Pollastro (1999), 45 R.F.L. (4th) 404 (Ont. C.A.).

[233] In considering whether the return of the child would place him in an intolerable position, it is appropriate to evaluate the possibility of physical or psychological harm coming to the parent on whom the child is totally dependent. This is especially so where the child is of such a tender age that his interests are inextricably linked to that parent's, in this case the mother's psychological and physical security. Pollastro v. Pollastro, supra.

[234] In the case at bar, there are many gaps in the evidence tendered by the respondent concerning the alleged abuse of her and G. at the hands of the applicant. Those gaps are referred to above. Were it not for the fresh evidence concerning the conviction of the applicant, and his attempt to defraud this court with the filing of false documents and affidavits, I would have ordered G. returned to Hungary to permit the courts in that country to decide the question of his custody on the merits.

[235] However, to accede to the applicant's position on this application would now effectively mean that G. would be returned to a father who is a fugitive from justice. He would, if returned to his father's care, be in an environment which would present a risk of psychological harm.

[236] The applicant suggests that this court could order G.'s return to Hungary, but not to his father's care. He would be content to leave the child in the respondent's care, in Hungary, until the Hungarian court determines the custody issue.

[237] My answer to that suggestion is a simple one. The applicant has a long criminal record for fraud and deceit. At least one of his convictions involved violence. He is now a fugitive from justice in his own country. I have no confidence that the applicant would not commit a further crime – abduction – in Hungary, by removing G. from whomever should be his guardian in Hungary.

[238] I am satisfied that ordering G.'s return to Hungary would place him in an intolerable situation, whether he was there in his mother's care or in the care of a third party.

[239] The application is dismissed.

[240] I may be spoken to on the question of costs.

Ferrier J.

Released: April 23, 2002

Phyllis Brodkin and Lorne Waldman for the applicant

Andrew C. Dekany and Rocco Galati for the respondent

Hart Schwartz and Sean Hanley for the Attorney General of Ontario

Cheryl D. Mitchell and Mielka Visnic for the Minister of Citizenship and Immigration (Canada)

Appendix – Legislation

Charter of Rights and Freedoms, Schedule B Constitution Act, 1982 (79)

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Children's Law Reform Act, R.S.O. 1990, c. C-12

40. Upon application, a court,

(a) that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Ontario; or

(b) that may not exercise jurisdiction under section 22 or that has declined jurisdiction under section 25 or 42, may do any one or more of the following:

1. Make such interim order in respect of the custody or access as the court considers is in the best interests of the child.

2. Stay the application subject to,

i. the condition that a party to the application promptly commence a similar proceeding before an extra-provincial tribunal, or

ii. such other conditions as the court considers appropriate.

3. Order a party to return the child to such place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application.

41. (1) Upon application by any person in whose favour an order for the custody of or access to a child has been made by an extra-provincial tribunal, a court shall recognize the order unless the court is satisfied,

(a) that the respondent was not given reasonable notice of the commencement of the proceeding in which the order was made;

(b) that the respondent was not given an opportunity to be heard by the extra-provincial tribunal before the order was made;

(c) that the law of the place in which the order was made did not require the extra-provincial tribunal to have regard for the best interests of the child;

(d) that the order of the extra-provincial tribunal is contrary to public policy in Ontario; or

(e) that, in accordance with section 22, the extra-provincial tribunal would not have jurisdiction if it were a court in Ontario.

(2) An order made by an extra-provincial tribunal that is recognized by a court shall be deemed to be an order of the court and enforceable as such. (2).

(3) A court presented with conflicting orders made by extra-provincial tribunals for the custody of or access to a child that, but for the conflict, would be recognized and enforced by the court under subsection (1) shall recognize and enforce the order that appears to the court to be most in accord with the best interests of the child.

(4) A court that has recognized an extra-provincial order may make such further orders under this Part as the court considers necessary to give effect to the order.

42. (1) Upon application, a court by order may supersede an extra-provincial order in respect of custody of or access to a child where the court is satisfied that there has been a material change in circumstances that affects or is likely to affect the best interests of the child and,

(a) the child is habitually resident in Ontario at the commencement of the application for the order; or

(b) although the child is not habitually resident in Ontario, the court is satisfied,

(i) that the child is physically present in Ontario at the commencement of the application for the order,

(ii) that the child no longer has a real and substantial connection with the place where the extra-provincial order was made,

(iii) that substantial evidence concerning the best interests of the child is available in Ontario,

(iv) that the child has a real and substantial connection with Ontario, and

(v) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario.

Declining jurisdiction

(2) A court may decline to exercise its jurisdiction under this section where it is of the opinion that it is more appropriate for jurisdiction to be exercised outside Ontario.

43. Upon application, a court by order may supersede an extra-provincial order in respect of custody of or access to a child if the court is satisfied that the child would, on the balance of probability, suffer serious harm if,

(a) the child remains in the custody of the person legally entitled to custody of the child;

(b) the child is returned to the custody of the person entitled to custody of the child; or

(c) the child is removed from Ontario.

44. A copy of an extra-provincial order certified as a true copy by a judge, other presiding officer or registrar of the tribunal that made the order or by a person charged with keeping the orders of the tribunal is proof, in the absence of evidence to the contrary, of the making of the order, the content of the order and the appointment and signature of the judge, presiding officer, registrar or other person.

45. For the purposes of an application under this Part, a court may take notice, without requiring formal proof, of the law of a jurisdiction outside Ontario and of a decision of an extra-provincial tribunal.

46. (1) In this section,

"convention" means the Convention on the Civil Aspects of International Child Abduction, set out in the Schedule to this section.

(2) On, from and after the 1st day of December, 1983, except as provided in subsection (3), the convention is in force in Ontario and the provisions thereof are law in Ontario.

(3) The Crown is not bound to assume any costs resulting under the convention from the participation of legal counsel or advisers or from court proceedings except in accordance with the Legal Aid Services Act, 1998.

(4) The Ministry of the Attorney General shall be the Central Authority for Ontario for the purpose of the convention.

(5) An application may be made to a court in pursuance of a right or an obligation under the convention.

(6) The Attorney General shall request the Government of Canada to submit a declaration to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, declaring that the convention extends to Ontario.

(7) The Lieutenant Governor in Council may make such regulations as the Lieutenant Governor in Council considers necessary to carry out the intent and purpose of this section.

(8) Where there is a conflict between this section and any other enactment, this section prevails.

53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

(a) the person is a member of an inadmissible class described in paragraph 19(1)(c) or subparagraph 19(1)(c.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada;

(b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada; or

(c) the person is a person described in subparagraph 27(1)(a.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada; or

(d) the person is a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed and the Minister is of the opinion that the person constitutes a danger to the public in Canada.

Idem

(2) Notwithstanding subsections 52(2) and (3), no person who has been determined not to be eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(b) shall be removed from Canada to any country other than the country from which the person came to Canada as determined for the purposes of that paragraph unless

(a) the country to which the person is to be removed is a prescribed country under paragraph 114(1)(s); or

(b) the person, following a reference of the claim to the Refugee Division pursuant to section 46.03, is determined by the Refugee Division not to be a Convention refugee.

Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 22

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

2. For this purpose, States Parties shall provide, as they consider appropriate, co- operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Convention Relating to the Status of Refugees, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, entry into force 22 April 1954, in accordance with article 43.

Article 1

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

Article 33

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

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

Extradition Act, 1999, c. 18

3. (1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on -- or enforcing a sentence imposed on -- the person if

(a) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and

(b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,

(i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and

(ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.

Hague Convention on the Civil Aspects of International Child Abduction

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Despite 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:

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Immigration Act, R.S. 1985, c. I-2.

2. (1) "Convention refugee" means any person who

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(b) has not ceased to be a Convention refugee by virtue of subsection (2), but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act; "departure notice" [Repealed, 1992, c. 49, s. 1]

3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need (g) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted;

4. (1) A Canadian citizen and a permanent resident have a right to come into Canada except where, in the case of a permanent resident, it is established that that person is a person described in subsection 27(1).

(2) Subject to any other Act of Parliament, a Canadian citizen and a permanent resident have a right to remain in Canada except where, in the case of a permanent resident, it is established that that person is a person described in subsection 27(1).

(2.1) Subject to any other Act of Parliament, a person who is determined under this Act or the regulations to be a Convention refugee has, while lawfully in Canada, a right to remain in Canada except where it is established that the person is a person described in paragraph 19(1)(c.1), (c.2), (d), (e), (f), (g), (j), (k) or (l) or a person who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of

(a) more than six months has been imposed; or

(b) five years or more may be imposed.

(3) A person who is registered as an Indian pursuant to the Indian Act has, whether or not that person is a Canadian citizen, the same rights and obligations under this Act as a Canadian citizen.

5. (1) No person, other than a person described in section 4, has a right to come into or remain in Canada.

Where immigrant shall be granted landing

(2) An immigrant shall be granted landing if he is not a member of an inadmissible class and otherwise meets the requirements of this Act and the regulations.

Where visitors may be granted entry or allowed to remain

(3) A visitor may be granted entry and allowed to remain in Canada during the period for which he was granted entry or for which he is otherwise authorized to remain in Canada if he meets the requirements of this Act and the regulations.

20. (1) Where an immigration officer is of the opinion that it would or may be contrary to this Act or the regulations to grant admission to a person examined by the officer or otherwise let that person come into Canada, the officer may detain or make an order to detain that person and shall (a) subject to subsection (2), report that person in writing to a senior immigration officer;

28. (2) No conditional departure order made pursuant to subsection (1) against a person who claims to be a Convention refugee is effective unless and until

(a) the person withdraws the claim to be a Convention refugee;

(a.1) the person is determined by a senior immigration officer not to be eligible to make a claim to be a Convention refugee and has been so notified;

(b) the person is declared by the Refugee Division to have abandoned the claim to be a Convention refugee and has been so notified;

(c) the person is determined by the Refugee Division not to be a Convention refugee and has been so notified; or

(d) the person is determined pursuant to subsection 46.07(1.1) or (2) not to have a right under subsection 4(2.1) to remain in Canada and has been so notified.

32.01. A person against whom a departure order has been made shall appear or be brought before an immigration officer so that the immigration officer can verify the person's departure from Canada and issue a certificate of departure in the prescribed form to the person.

32.02. (1) Where no certificate of departure is issued within the applicable period specified in the regulations to a person against whom a departure order has been made, the departure order is deemed to be a deportation order made against the person.

32.1. (6) No conditional removal order made against a claimant is effective unless and until

(a) the claimant withdraws the claim to be a Convention refugee;

(a.1) the claimant is determined by a senior immigration officer not to be eligible to make a claim to be a Convention refugee and has been so notified;

(b) the claimant is declared by the Refugee Division to have abandoned the claim to be a Convention refugee and has been so notified;

(c) the claimant is determined by the Refugee Division not to be a Convention refugee and has been so notified; or

(d) the claimant is determined pursuant to subsection 46.07(2) not to have a right under subsection 4(2.1) to remain in Canada and has been so notified.

44. (1) Any person who is in Canada, other than a person against whom a removal order has been made but not executed, unless an appeal from that order has been allowed, and who

claims to be a Convention refugee may seek a determination of the claim by notifying an immigration officer.

(2) An immigration officer who is notified pursuant to subsection (1) shall forthwith refer the claim to a senior immigration officer.

(3) Where a person who is the subject of an inquiry claims in accordance with subsection (1) to be a Convention refugee, the adjudicator shall determine whether the person may be permitted to come into or remain in Canada, as the case may be, and shall take the appropriate action under subsection 32(1), (3) or (4) or section 32.1, as the case may be, in respect of the person.

(4) Where a claim to be a Convention refugee by a person who is the subject of an inquiry is referred to a senior immigration officer and the senior immigration officer determines, before the conclusion of the inquiry, that the person is not eligible to have the claim determined by the Refugee Division, the adjudicator shall take the appropriate action under section 32 in respect of the person.

(5) Subject to sections 46.3 and 46.4, where a person makes more than one claim to be a Convention refugee, those claims are, for the purposes of this Act, deemed to be a single claim.

45. (1) Where a person's claim to be a Convention refugee is referred to a senior immigration officer, the senior immigration officer shall

(a) subject to subsection (2), determine whether the person is eligible to have the claim determined by the Refugee Division; and

(b) if the person is the subject of a report under subsection 20(1) or 27(1) or (2) or has been arrested pursuant to subsection 103(2), take the appropriate action referred to in any of subsections 23(4), (4.01) or (4.2) or 27(4) or (6) or section 28.

(2) Where a person referred to in subsection (1) is alleged to be a person described in paragraph 19(1)(c), subparagraph 19(1)(c.1)(i) or paragraph 19(1)(e), (f), (g), (j), (k) or

(l), the senior immigration officer shall not make the determination referred to in paragraph (1)(a) until an adjudicator determines that the person is, or is not, a person described in any of those paragraphs.

(3) On making a determination under paragraph (1)(a), the senior immigration officer shall notify the person in writing of the determination and, where the person is determined not to be eligible to have a claim to be a Convention refugee referred to the Refugee Division, shall include in the notification the basis for the determination.

(4) The burden of proving that a person is eligible to have a claim to be a Convention refugee determined by the Refugee Division rests on the person.

(5) Every person who claims to be a Convention refugee shall truthfully provide such information as may be required by the senior immigration officer to whom the person's claim is referred for the purpose of determining whether the person is eligible to have the claim determined by the Refugee Division.

46.01. (1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person

(a) has been recognized as a Convention refugee by a country, other than Canada, that is a country to which the person can be returned;

(b) came to Canada, directly or indirectly, from a country, other than a country of the person's nationality or, where the person has no country of nationality, the country of the person's habitual residence, that is a prescribed country under paragraph 114(1)(s);

(c) has, since last coming into Canada, been determined

(i) by the Refugee Division not to be a Convention refugee or to have abandoned the claim, or

(ii) by a senior immigration officer not to be eligible to have the claim determined by the Refugee Division;

(d) has been determined under this Act or the regulations, to be a Convention refugee; or

(e) has been determined by an adjudicator to be

(i) a person described in paragraph 19(1)(c) or subparagraph 19(1)(c.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada,

(ii) a person described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that it would be contrary to the public interest to have the claim determined under this Act,

(iii) a person described in subparagraph 27(1)(a.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada, or

(iv) a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed and the Minister is of the opinion that the person constitutes a danger to the public in Canada.

(1.1) A person who claims to be a Convention Refugee on or after the day on which this subsection comes into force is not eligible to have the claim determined by the Refugee Division if

(a) the person had, before that day, claimed to be a Convention Refugee and the person was determined not to have a credible basis for the claim;

(b) the person was, before that day, issued a departure notice; and

(c) the person has not left Canada since the departure notice was issued.

(2) The Minister may, by order, suspend the application of paragraph (1)(b) for such period, or in respect of such classes of persons, as may be specified in the order.

(3) For the purposes of paragraph (1)(b),

(a) subject to any agreement entered into pursuant to section 108.1, a person who is in a country solely for the purpose of joining a connecting flight to Canada shall not be considered as coming to Canada from that country; and

(b) a person who comes to Canada from a country shall be considered as coming to Canada from that country whether or not the person was lawfully in that country.

(4) For the purposes of paragraph (1)(b), where a person who has come to Canada in a vehicle seeks to come into Canada without a valid and subsisting passport or travel document issued to that person and claims to be a Convention refugee, the burden of proving that the person has not come to Canada from the country in which the vehicle last embarked passengers rests on that person.

(5) A person who goes to another country and returns to Canada within ninety days shall not, for the purposes of paragraph (1)(c), be considered as coming into Canada on that return.

(6) and (7) [Repealed, 1992, c. 49, s. 36]

49. (1) Subject to subsection (1.1), the execution of a removal order made against a person is stayed

(c) subject to paragraphs (d) and (f), in any case where a person has been determined by the Refugee Division not to be a Convention refugee or a person's appeal from the order has been dismissed by the Appeal Division,

(i) where the person against whom the order was made files an application for leave to commence a judicial review proceeding under the Federal Court Act or signifies in writing to an immigration officer an intention to file such an application, until the application for leave has been heard and disposed of or the time normally limited for filing an application for leave has elapsed and, where leave is granted, until the judicial review proceeding has been heard and disposed of,

(ii) in any case where the person has filed with the Federal Court of Appeal an appeal of a decision of the Federal Court -- Trial Division where a judge of that Court has at the time of rendering judgment certified in accordance with subsection 83(1) that a serious question of general importance was involved and has stated that question, or signifies in writing to an immigration officer an intention to file a notice of appeal to commence such an appeal, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be, and

(iii) in any case where the person files an application for leave to appeal or signifies in writing to an immigration officer an intention to file an application for leave to appeal a decision of the Federal Court of Appeal on an appeal referred to in subparagraph (ii) to the Supreme Court of Canada, until the application for leave to appeal has been heard and disposed of or the time normally limited for filing an application for leave to appeal has elapsed and, where leave to appeal is granted, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be;

53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

(a) the person is a member of an inadmissible class described in paragraph 19(1)(c) or subparagraph 19(1)(c.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada;

(b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada; or

(c) the person is a person described in subparagraph 27(1)(a.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada; or

(d) the person is a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed and the Minister is of the opinion that the person constitutes a danger to the public in Canada.

Idem

(2) Notwithstanding subsections 52(2) and (3), no person who has been determined not to be eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(b) shall be removed from Canada to any country other than the country from which the person came to Canada as determined for the purposes of that paragraph unless

(a) the country to which the person is to be removed is a prescribed country under paragraph 114(1)(s); or

(b) the person, following a reference of the claim to the Refugee Division pursuant to section 46.03, is determined by the Refugee Division not to be a Convention refugee.

65. (1) Subject to the approval of the Governor in Council, the Chairperson, in consultation with the Deputy Chairperson (Convention Refugee Determination Division), the Deputy Chairperson (Immigration Appeal Division) and the Director General (Adjudication Division) may make rules

(a) governing the activities of, and the practice and procedure in, the Refugee Division, the Appeal Division and the Adjudication Division, including the functions of counsel employed by the Board;

(b) prescribing a system of priorities for dealing with matters before the Refugee Division, Appeal Division or Adjudication Division;

(c) prescribing the information that may be required under subsection 46.03(2) and the manner and the time within which it must be provided;

(d) governing the determination under subsection 69.1(7.1) of claims of persons who claim to be Convention refugees; and

(e) prescribing any matter that is authorized by this Act to be prescribed by the rules.

(2) The Minister shall cause a copy of all rules made pursuant to subsection (1) to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the approval of the rules by the Governor in Council.

(3) The Chairperson may, after consulting with the Deputy Chairperson and the Assistant Deputy Chairpersons of the Refugee Division and the Appeal Division and the coordinating members of the Refugee Division, issue guidelines to assist the members of the Refugee Division and Appeal Division in carrying out their duties under this Act.

(4) The Chairperson may, after consulting with the Director General and the directors of the Adjudication Division, issue guidelines to assist the members of the Adjudication Division in carrying out their duties under this Act.

67. (1) The Refugee Division has, in respect of proceedings under sections 69.1 and 69.2, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

(2) The Refugee Division, and each member thereof, has all the powers and authority of a commissioner appointed under Part I of the Inquiries Act and, without restricting the generality of the foregoing, may, for the purposes of a hearing,

(a) issue a summons to any person requiring that person to appear at the time and place mentioned therein to testify with respect to all matters within that person's knowledge relative to the subject-matter of the hearing and to bring and produce any document, book or paper that the person has or controls relative to that subject-matter;

(b) administer oaths and examine any person on oath;

(c) issue commissions or requests to take evidence in Canada; and

(d) do any other thing necessary to provide a full and proper hearing.

68. (2) The Refugee Division shall deal with all proceedings before it as informally and expeditiously as the circumstances and the considerations of fairness permit.

(3) The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

69. (4) Where a person who is the subject of proceedings before the Refugee Division is under eighteen years of age or is unable, in the opinion of the Division, to appreciate the nature of the proceedings, the Division shall designate another person to represent that person in the proceedings.

69.1. (1) Subject to subsection (2), where a person's claim to be a Convention refugee is referred to the Refugee Division pursuant to section 46.02 or 46.03, the Division shall, as soon as is practicable, commence a hearing into the claim.

(2) Where a person's claim to be a Convention refugee is referred to the Refugee Division pursuant to section 46.02 or 46.03, the Division shall, if the Minister so requests in writing at the time of the referral, provide the Minister with the information referred to in subsection 46.03(2) and, as soon as is practicable after the expiration of the period referred to in subsection (7.1), commence a hearing into the claim.

(3) The Refugee Division shall notify the person who claims to be a Convention refugee and the Minister in writing of the time and place set for the hearing into the claim.

(4) [Repealed, 1992, c. 49, s. 60]

(5) At the hearing into a person's claim to be a Convention refugee, the Refugee Division

(a) shall give

(i) the person a reasonable opportunity to present evidence, question witnesses and make representations, and

(ii) the Minister a reasonable opportunity to present evidence and, if the Minister notifies the Refugee Division that the Minister is of the opinion that matters involving section E or F of Article 1 of the Convention or subsection 2(2) of this Act are raised by the claim, to question the person making the claim and other witnesses and make representations; and

(b) may, if it considers it appropriate to do so, give the Minister a reasonable opportunity to question the person making the claim and any other witnesses and to make representations concerning the claim.

(6) Where a person who claims to be a Convention refugee

(a) fails to appear at the time and place set by the Refugee Division for the hearing into the claim,

(b) fails to provide the Refugee Division with the information referred to in subsection 46.03 (2), or

(c) in the opinion of the Division, is otherwise in default in the prosecution of the claim, the Refugee Division may, after giving the person a reasonable opportunity to be heard, declare the claim to have been abandoned and, where it does so, the Refugee Division shall send a written notice of its decision to the person and to the Minister.

(7) Subject to subsection (8), two members constitute a quorum of the Refugee Division for the purposes of a hearing under this section.

(7.1) Notwithstanding subsections (1) and (2), where the Minister does not, at any time within the period prescribed by rules made under subsection 65(1), notify the Refugee Division that the Minister intends to participate in accordance with subsection (5) at any hearing into a person's claim to be a Convention refugee, a member of the Refugee Division may, in accordance with any rules made under paragraph 65(1)(d), determine that the person is a Convention refugee without a hearing into the matter.

(8) One member of the Refugee Division may hear and determine a claim under this section if the person making the claim consents thereto, and the provisions of this Part apply in respect of a member so acting as they apply in respect of the Refugee Division, and the disposition of the claim by the member shall be deemed to be the disposition of the Refugee Division.

(9) The Refugee Division shall determine whether or not the person referred to in subsection (1) is a Convention refugee and shall render its decision as soon as possible after completion of the hearing and send a written notice of the decision to the person and to the Minister.

(9.1) If each member of the Refugee Division hearing a claim is of the opinion that the person making the claim is not a Convention refugee and is of the opinion that there was no credible or trustworthy evidence on which that member could have determined that the person was a Convention refugee, the decision on the claim shall state that there was no credible basis for the claim.

(10) Subject to subsection (10.1), in the event of a split decision, the decision favourable to the person who claims to be a Convention refugee shall be deemed to be the decision of the Refugee Division.

(10.1) Where, with respect to any person who claims to be a Convention refugee, both members of the Refugee Division hearing the claim are satisfied

(a) that there are reasonable grounds to believe that the person, without valid reason, has destroyed or disposed of identity documents that were in the person's possession,

(b) that the person has, since making the claim, visited the country that the person claims to have left, or outside of which the person claims to have remained, by reason of fear of persecution, or

(c) that the country that the person claims to have left, or outside of which the person claims to have remained, by reason of fear of persecution is a country that is prescribed under paragraph 114(1)(s.1) to be a country that respects human rights, then, in the event of a split decision on the claim, the decision not favourable to the person shall be deemed to be the decision of the Refugee Division.

(11) The Refugee Division may give written reasons for its decision on a claim, except that

(a) if the decision is against the person making the claim, the Division shall, with the written notice of the decision referred to in subsection (9), give written reasons with the decision; and

(b) if the Minister or the person making the claim requests written reasons within ten days after the day on which the Minister or the person is notified of the decision, the Division shall forthwith give written reasons.

(12) If an authority to proceed has been issued under section 15 of the Extradition Act with respect to a person for an offence under Canadian law that is punishable under an Act of Parliament by a maximum term of imprisonment of 10 years or more, a hearing under subsection (1) or (2) shall not be commenced with respect to the person, or if commenced, shall be adjourned, until the final decision under that Act with respect to the discharge or surrender of the person has been made.

(13) If the person is finally discharged under the Extradition Act, the hearing may be commenced or continued, or the Refugee Division may proceed, as though there had not been any proceedings under the Extradition Act.

(14) If the person is ordered surrendered by the Minister of Justice under the Extradition Act and the offence for which the person was committed by the judge under section 29 of that Act is punishable under an Act of Parliament by a maximum term of imprisonment of 10 years or more, the order of surrender is deemed to be a decision by the Refugee Division that the person is not a Convention refugee because of paragraph

(b) of Section F of its Article 1, except that no appeal or judicial review of the decision shall be permitted except to the extent that a judicial review of the order of surrender is provided for under the Extradition Act.

(15) For greater certainty, if the person has not made a claim under section 44 before the order of surrender referred to in subsection (14), the person may not do so before the surrender.

80.1. (1) Subject to section 40.2, an adjudicator has sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, that may arise in the course of proceedings that are required by this Act to be held before an adjudicator.

(2) An adjudicator has all the powers and authority of a commissioner appointed under Part I of the Inquiries Act and, without restricting the generality of the foregoing, may, for the purposes of any proceedings that are required by this Act to be held before an adjudicator,

(a) issue a summons to any person requiring the person to appear at the time and place set out in the summons to testify with respect to all matters within that person's knowledge relative to the subject-matter of the proceedings and to bring and produce any document, book or paper in the person's possession or under the person's control relative to the subject-matter of the proceedings;

(b) administer oaths and examine any person under oath;

(c) issue commissions or requests to take evidence in Canada; and

(d) do all other things necessary to provide for the full and proper conduct of the proceedings.

(3) Adjudicators shall sit at the times and at the places in Canada that are considered necessary by the Chairperson for the proper conduct of their business.

(4) An adjudicator shall deal with all proceedings as informally and expeditiously as the circumstances and considerations of fairness permit.

(5) An adjudicator is not bound by any legal or technical rules of evidence and, in any proceedings, may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

110(2). An immigration officer may

(a) require the following persons to comply with the regulations providing for their identification, namely,

(i) persons who seek admission,

(ii) persons who make an application pursuant to subsection 9(1), section 10, subsection 10.2 (1) or section 16,

(iii) persons who are arrested pursuant to section 103,

(iv) persons against whom a removal order or conditional removal order has been made, and

(v) persons who claim to be Convention refugees;

(a.1) search persons seeking to come into Canada who the immigration officer believes on reasonable grounds have not revealed their identity or who have hidden on or about their person documents that are relevant to their admissibility and may search any vehicle that conveyed the persons to Canada and their luggage and personal effects;

(a.2) search persons seeking to come into Canada who the immigration officer believes on reasonable grounds have committed, or who are in possession of documents that may be

used in the commission of, an offence under section 94.1, 94.2 or 94.4 may search any vehicle that conveyed the persons to Canada and their luggage and personal effects;

(a.3) examine at a port of entry or any other place in Canada, for the purposes of this Act or the regulations, any visa, passport or other travel document, any document or thing that may serve to establish the identity of a person or any document or thing purporting to be any of those documents or things that is imported into or about to be imported into or exported from Canada;

(b) seize and hold at a port of entry or any other place in Canada any thing or document if the immigration officer believes on reasonable grounds that that action is required to facilitate the carrying out of any provision of this Act or the regulations; and

(c) for the purposes of this Act and the regulations, seize and hold any thing or document if the immigration officer believes on reasonable grounds that it has been fraudulently or improperly obtained or used or that action is necessary to prevent its fraudulent or improper use.

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