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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA
(FAMILY DIVISION)

B E T W E E N:

	)	COUNSEL:
	)	
DAWINDER SINGH,	)	
	)	CANDRY D. MEHKARY
Applicant,	)	for the Central Authority for the
	)	Province of Manitoba, on behalf
- and -	)	of the Applicant
	)	
AMANDEEP KAUR,	)	
	)	MARK G. MERCIER
Respondent.	)	for the Respondent
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	March 8, 2022

MacPHAIL J.

[1] This proceeding involves a father's application requesting the return of his eight-year-old son to Italy, pursuant to the provisions of the 1980 Hague *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 (the "Hague Abduction Convention" or "Convention"), with claims for related relief. The mother opposes the father's application

("Hague Abduction Convention request for return", "request for return application" or "application").

[2] The mother also sought a stay or an adjournment of the Hague Abduction Convention request for return pending determination of her claim for refugee protection for herself and the child pursuant to section 99(3) of the ***Immigration and Refugee Protection Act***, S.C. 2001 c. 27, and an adjournment of the father's application so that a "voice of the child" report could be prepared.

BACKGROUND

[3] The parties were each born in India but are now Italian citizens. The father immigrated to Italy some twenty years ago. The parties were married in India on March 30, 2010 and, after a period living with members of the father's family, the mother moved to Italy in September of 2011.

[4] From the time the mother arrived in Italy, the parties resided in a three-bedroom apartment in the municipality of Cessalto with members of the father's family (his parents, sister and brother-in-law and now nine-year-old nephew). The father's father has owned the apartment since 2005.

[5] The party's son, Aviraj, was born in Italy on August 2, 2013 and is an Italian citizen. Until the mother brought him to Canada at the end of September 2021, the child resided in Italy his entire life, in the aforementioned apartment with his parents and his paternal relatives. He attended the same school as his cousin, the Comprehensive School of Motta di Livenza.

[6] On September 29, 2021 the mother left Italy with Aviraj and arrived in Canada. The parties' evidence differed respecting the arrangements for, and events that occurred on the day of, their trip. While in Canada, the mother and Aviraj have stayed with her cousin in Winnipeg.

[7] The mother contended that the father was well aware of, and agreed with, her plans to travel to Canada with Aviraj and drove them to the airport the day of their departure. The father denied this and contended he was unaware of the mother had left until his sister told him she was advised that the mother and Aviraj had left for Canada, and officials at Aviraj's school thereafter confirmed the child was not present.

[8] The father went to a police station at approximately noon on September 29, 2021 and made a report that included a statement that he believed the mother had relatives in Canada, in Surrey and Winnipeg. He subsequently contacted the Italian Central Authority for purposes of the Hague Abduction Convention, signing a power of attorney on October 5, 2021 and a form requesting the return of Aviraj to Italy on October 8, 2021.

[9] On November 9, 2021, the father's request for return form, with supporting documents, was received by the Family Law Section of the Manitoba Department of Justice from the Italian Central Authority via e-mail. The Department is the designated Central Authority for the Province of Manitoba for purposes of the Hague Abduction Convention pursuant to subsection 17(3)

of ***The Child Custody Enforcement Act***, C.C.S.M. c. C360 ("Manitoba Central Authority").

[10] In accordance with the June 2007 Court of Queen's Bench of Manitoba Procedural Protocol for the handling of Hague Abduction Convention cases and the related ***Court of Queen's Bench Rules***, Man. Reg. 553/88, on November 17, 2021, the Manitoba Central Authority filed requisitions with this Court to open a Court file, and giving notice of the father's allegation that the child, Aviraj, was removed from his habitual residence in Italy and being wrongfully retained in Manitoba, and that the Manitoba Central Authority had received and was processing an application for the return of the child, and anticipated bringing such proceedings in this Court. The second requisition further gave notice that pursuant to Article 16 of the Hague Abduction Convention, the Manitoba Courts "shall not decide on the merits of rights of custody until it has been determined that the children [sic] are not be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

[11] Further in accordance with the Procedural Protocol, the father's Hague Abduction Convention request for return was commenced in this Court by the Manitoba Central Authority filing a Notice of Application on November 18, 2021 seeking an order for the return of the child to Italy, as well as other related relief, together with the affidavit of Maury Stephensen, Crown Counsel, sworn that day, to which the e-mailed copies of the father's request for return form and other

supporting documents from the Italian Central Authority were attached as exhibits. The affidavit stated that "The Request for Return was not filed with the court earlier because there was no confirmation that the Respondent was residing in Manitoba until November 17, 2021."

[12] The mother was served with the Notice of Application and Mr. Stephensen's affidavit on November 26, 2021 and appeared in this Court on November 30, 2021, via teleconference, before the Honourable Gwen Hatch, Associate Chief Justice of the Court of Queen's Bench (Family Division). On that date an Interim Order was pronounced that, as required by this Court's Procedural Protocol, set timelines for the filing and service of further materials and January 27, 2022 as the date for hearing of the father's request for return application, as well as addressing other issues such the child's non-removal from Winnipeg and place of residence pending determination of the father's application. With the exception of the requirement that within 24 hours she deliver her passport and that of the child to the Court Registry for safekeeping pending further order of the Court, the mother consented to the terms of the Interim Order.

[13] After the November 30, 2021 appearance, the mother retained and was represented by counsel in this proceeding and submitted her materials with their assistance.

[14] The hearing of the father's Hague Abduction Convention request for return was scheduled to proceed on January 27, 2022 via MS Teams videoconference, in accordance with the Court's procedural directives aimed at reducing the spread of

COVID-19. The father appeared with his Italian counsel, Mr. Luca Berletti, assisted by a translator, Ms. Anna Martini, who provided them with concurrent, general translation of the proceedings into Italian. In addition to Crown Counsel for the Manitoba Central Authority, Ms. Candray Mehkary, and the mother's lawyer, Mr. Mark Mercier, an immigration lawyer, Mr. David Davis, also appeared. The mother did not appear as she was then meeting with representatives of Mr. Davis' law firm.

[15] At the beginning of the appearance, Mr. Mercier indicated that the prior afternoon the mother advised him she would be pursuing a refugee application, and she was currently in the process of consulting with Mr. Davis' office for that purpose. Mr. Mercier sought a stay or adjournment of the father's request for return application due to the mother's intended refugee application, as well as an adjournment to enable a "voice of the child" report to be prepared. Counsel for the Manitoba Central Authority was advised of these developments/requests approximately an hour before the hearing was to commence, and strongly opposed any stay or adjournment.

[16] To ensure greater certainty with respect to the existence of a refugee claim and understanding of the estimated time frames involved, and to enable counsel to submit further evidence, briefs and case law relating to these new issues and requests by the mother, I adjourned the hearing to February 16, 2022, and set certain filing deadlines. I also granted the mother leave to re-file her December 29, 2021 affidavit with the appropriate notation that it was

translated to her[1], and to file an affidavit attaching her refugee application as well as replying to the affidavits the father filed in response to her initial affidavit, in addition to affidavits relating to her request that a "voice of the child" report be prepared, and an affidavit from Mr. Davis' office respecting the estimated time frame for a refugee application to be heard.

[17] All of these further materials were filed and reviewed by me prior to the continuation of the hearing.

[18] The videoconference hearing resumed as scheduled on February 16, 2022. The father, his Italian counsel and a different translator, Ms. Eleonora Giust (who provided the father and his lawyer with verbatim translation of the proceedings to Italian), and Ms. Mehkary, Mr. Mercier and the mother and a translator, Ms. Polly Pachu (who provided translation of the proceedings to the mother in Punjabi, as and when the mother requested) appeared.

[19] Having reviewed the evidence, briefs and authorities submitted by counsel, and after hearing their comprehensive arguments, I denied the mother's requests for a stay and/or an adjournment of the father's Hague Abduction Convention request for return on the basis of her applications for refugee protection for herself and the child. I also denied her request for an adjournment for preparation of a "voice of the child" report. I advised counsel that my reasons for those decisions

[1] The mother has deposed that she "can speak and understands English to some degree." She has chosen to be assisted by a translator on some occasions and not on others (stating on her refugee application that she understood the content of the documents and did not require translation).

would be included in my written decision respecting the father's request for return application.

[20] All of those reasons now follow.

OVERVIEW OF THE HAGUE ABDUCTION CONVENTION

[21] The Hague Abduction Convention has been law, and in force, in the Province of Manitoba since December 1, 1983, pursuant to subsection 17(2) of ***The Child Custody Enforcement Act***.

[22] The preamble of the Convention provides that it is intended to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence … ."

[23] Article 1 of the Hague Abduction Convention describes its objects as being:

> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[24] The Explanatory Report prepared by Professor Elisa Pérez-Vera as a commentary on the Convention, Acts and Documents of the Fourteenth Session (1980), Book III, Child Abduction, Hague Conference on Private International Law states at paragraph 19, " … the Convention rests implicitly on the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal … ."

[25] Article 3 of the Hague Abduction Convention provides when a removal or retention is wrongful and Article 4 the children to whom the Convention applies.

[26] Article 12 of the Hague Abduction Convention requires the prompt return of wrongfully removed (or retained) children. It provides:

> Article 12
>
> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial … 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.

[27] The Article 12 requirement for prompt return is subject to the exceptions set out in Article 13 and Article 20.

[28] The relevant portions of Article 13, and Article 20 of the Hague Abduction Convention provide:

> Article 13
>
> Notwithstanding the provisions of the preceding Article, the judicial … authority of the requested State is not bound to order the return of the child if the person … which opposes its return establishes that –
>
> a) the person ... 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 … 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. …

> 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.

[29] Notwithstanding these exceptions to the requirement for prompt return, Article 18 provides that "The provisions of this Chapter do not limit the power of a judicial … authority to order the return of a child at any time."

REQUEST FOR STAY/ADJOURNMENT – APPLICATION FOR REFUGEE PROTECTION

[30] On February 4, 2022, the mother submitted applications for refugee protection for herself and the child ("refugee applications", "refugee claims") pursuant to section 99(3) of the ***Immigration and Refugee Protection Act***, with the assistance of her immigration lawyer, Mr. Davis, through the Canadian Refugee Protection Portal of the Department of Immigration, Refugees and Citizenship Canada.

[31] The mother's refugee applications were attached as Exhibit "A" to her affidavit affirmed February 7, 2022, and contain a declaration that she has "fully and truthfully answered all questions in this form and any attached application" and she has "read and understood all the statements on this form, having asked and obtained an explanation for every point that was not clear to me."

[32] The mother's counsel in this proceeding helpfully added handwritten page numbers at the top right corner of each page of her refugee applications, for ease of reference. In addition to responses to various questions throughout the refugee

applications, the details of her refugee claim and that of the child appear at pages 36 - 39 and 76 - 78 of the application form, respectively.

[33] Because the mother's applications for refugee protection are made on the basis of alleged domestic violence, aspects of her arguments relating to her request for a stay and/or adjournment because of those applications are intertwined with her arguments that an Article 13(b) (grave risk of harm) exception exists to the Convention's Article 12 requirement for the prompt return of the child to Italy. Although the evidence and determination of those issues in the context of the father's Hague Abduction Convention request for return are addressed later in these reasons, the evidence was also relevant to her request for a stay and/or adjournment of the father's application.

[34] The fundamental issue is whether the mother's refugee application for the child should operate to stay, and necessitate the adjournment of, the father's Hague Abduction Convention request for return of the child, until determination of the application. The mother argued that the refugee application should have that effect; the Manitoba Central Authority argued that it should not and the hearing of the father's request for return application should proceed.

[35] The only evidence provided respecting the timing of initial refugee hearings was contained in the affidavit of Audrey Limon, a legal assistant from Mr. Davis' firm. She stated that their "law office was in contact with other counsel who do refugee hearings and it is our understanding that a hearing date is normally set about 9 to 10 months after the initial claim has been submitted."

[36] The ***Immigration and Refugee Protection Act*** provides:

> **Referral to Refugee Protection Division**
>
> **100(1)** An officer shall, after receipt of a claim referred to in subsection 99(3), to determine whether the claim is eligible to be referred to the Refugee Protection Division, and if it is eligible, shall refer the claim in accordance with the rules of the [Immigration and Refugee Board]."

[37] No evidence was provided that the submission, and acknowledgement of submission, of a refugee claim through the Canadian Refugee Protection Portal of the Department of Immigration, Refugees and Citizenship Canada ensures the claim is eligible and will be referred to the Refugee Protection Division pursuant to subsection 100(1) of the ***Act***.

[38] In addition, assuming the mother's refugee claims are eligible and ultimately heard by the Immigration and Refugee Board, no evidence was provided as to how long it might take for the Board to issue their decision after the hearing, or what time frames might be entailed for other proceedings to occur and conclude in the event the mother's application was unsuccessful and she sought a review or appeal of the Board's decision.

[39] The time frames involved in the refugee determination process are clearly at odds with the clear direction in both the Hague Abduction Convention, and Canadian and other jurisprudence, respecting the importance of speedy consideration and determination of Convention applications for the return of a child.

[40] The mother arrived in Canada with the child on September 29, 2021. She gave contradictory evidence about her intentions. She deposed on the one hand

that they arrived for a one month stay and she intended to return to Italy at the end of that time and, on the other hand, that the plan was for the father to follow her to Canada where they would apply for work permits so they could live here and it was only after he changed his mind that she decided not to return.

[41] In her affidavit attaching her application for refugee status, the mother indicated that:

> 25. I did not initially apply for Refugee Status when I arrived in Canada as the Applicant was going to follow me and we were applying for work permits. I was receiving advice from an immigration consultant, Gursimranveer Singh of Bright Sky Immigration after the Applicant changed his mind about agreeing to me leaving Italy. He advised me to apply for refugee status and referred me to David Davis.

[42] Her refugee application made no mention of this joint "plan" to move to Canada, only detailed her allegations of domestic violence and repeated in several places that when she came to Canada with the child it was for a month and she intended to return to Italy after that time. In addition, the mother did not indicate in her refugee application, that, as deposed in her initial affidavit, she had already "applied for immigration standing in Canada" (on an unspecified date after arriving in Canada) and was "approved under the "International Experience Canada Pool"". (Her acceptance notice was dated October 26, 2021, and as of the end of December she had applied for but not yet received a work permit.)

[43] The mother was served with the father's request for return application on November 26, 2021. Months went by and, on the eve of the initial date for the hearing of the father's request for return, the mother commenced the process to apply for refugee protection for herself and the child.

[44] I agree with the position of the Manitoba Central Authority that, in part because of the varying evidence of the mother with respect to the circumstances of her and the child's arrival in Canada, and the family's plans, while it is clear the mother would like to remain in Canada, the refugee applications appear to have largely been made to prolong or defeat the father's Hague Abduction Convention request for return.

[45] Counsel for the Central Authority referred me to the Ontario Superior Court of Justice case of ***Kovacs v. Kovacs***, 2002 CanLII 49485 (ON SC), 59 OR (3d) 671, at paras. 107 and 122-127:

> [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.
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> . . . . .
>
> [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, GA res. 44/25, 44 UN G.A.O.R. Supp. (No. 49) at 167, U.N. Doc. A/44/99 (1989).

> 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.

[46] The Ontario Court of Appeal approved the ***Kovacs*** decision in ***Toiber v. Toiber***, 2006 CanLII 9407 (ONCA), 208 O.A.C. 391.

[47] The mother, on her part, relied on the more recent Ontario Court of Appeal decision in ***A.M.R.I. v. K.E.R.***, 2011 ONCA 417 (CanLII), and argued it changed the manner in which Hague Abduction Convention cases should be dealt with when refugee claims were involved.

[48] Both ***Kovacs*** and ***Toiber*** involved situations where a refugee application was pending. In the case before me, the mother's applications for refugee protection had not even been made on the day she initially sought the stay and/or adjournment of the father's application.

[49] ***A.M.R.I.*** involved a very different fact situation than in this case, one where a child had been granted refugee status prior to a return order being made pursuant to the Convention. The Ontario Court of Appeal considered the interaction of the principle of *non-refoulement* of refugees pursuant to section 115 of the ***Immigration and Refugee Protection Act*** and the Article 13(b) and 20 exceptions to mandatory return pursuant to the Hague Abduction Convention.

[50] Section 115 of the ***Immigration and Refugee Protection Act*** provides:

> **Principle of Non-refoulement**
>
> **Protection**
>
> **115 (1)** A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

Exceptions

(2) Subsection (1) does not apply in the case of a person

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

Removal of refugee

(3) A person, after a determination under paragraph 101(1)(e) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.

[51] At paragraphs 63, 68 and 74 of ***A.M.R.I.*** the Court stated:

[63] First, the assertion of operational conflict: in our view, the Supreme Court's recent decision in Németh is dispositive of this issue. In Németh, the Supreme Court held, at paras. 24-31, that "removal" under s. 115 of the IRPA refers to removal processes under the IRPA, and does not apply to removal from Canada by surrender for extradition. On the authority of Németh, therefore, the prohibition on removal under s. 115 does not apply to removals effected under entirely different statutory schemes -- in this case, under the Hague Convention's mandatory return process. On this basis, there is no operational conflict between s. 115 of the IRPA and s. 46 of the CLRA

. . . . .

[68] In our view, properly interpreted, the Hague Convention contemplates respect for and fulfillment of Canada's non-refoulement obligations. Specifically, art. 13(b) of the Hague Convention permits the refusal of an order of return concerning a child, who would otherwise be automatically returnable under art. 12, if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". In addition, art. 20 provides for the denial of an order of return if it would not be permitted "by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms". In accordance with the interpretive principles set out above, arts. 13(b) and 20 must be construed in a manner that takes account of the principle of non-refoulement.

. . . . .

> [74] That said, in our opinion, when a child has been recognized as a Convention refugee by the IRB, a rebuttable presumption arises that there is a risk of persecution on return of the child to his or her country of habitual residence. A risk of "persecution" in the immigration context clearly implicates the type of harm contemplated by art. 13(b) of the Hague Convention.

[52] I agree with the Manitoba Central Authority that a situation where a child has been granted refugee status raises different issues than the situation in this case. I need not consider what those different issues may be, or how they may or should be taken into account, given the facts before me; those are issues for determination in a future case. Unlike the child in ***A.M.R.I.***, Aviraj has not been granted refugee status.

[53] The mother also relied on the decision of ***M.A.A. v. D.E.M.E.***, 2020 ONCA 486 (CanLII), arguing that it confirmed a changed approach to orders for the return of children in cases involving refugee applications and allegations of domestic violence.

[54] In ***M.A.A.*** the mother brought three children to Canada from Kuwait without the father's consent and, "[o]n arrival, sought refugee status for herself and the children" (para. 1). The father obtained a custody order and an "obedience" order in Kuwait and sought the return of the children pursuant to Ontario's child custody enforcement legislation. The initial return order was overturned on appeal.

[55] ***M.A.A.*** again involved a situation very different to the case at hand. It did not involve an application for return pursuant to the Hague Abduction Convention,

but a proceeding pursuant to Ontario's child custody enforcement legislation requesting the return of children to a non-Convention country.

[56] Although the Ontario Court of Appeal in ***M.A.A.*** made the following statements respecting the effect of the refugee claim on the father's application, they did not, as noted in the highlighted sentence below, indicate the principles applied to Hague Abduction Convention cases:

> [61] The principle of non-refoulement has been considered the cornerstone of international refugee protection. Canada has implemented the principle of non-refoulement in s. 115(1) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27, which provides:
>
> 115(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.
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> [62] Canada has ratified both the 1951 Refugee Convention and the Protocol relating to the Status of Refugees. In Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, [2002] S.C.J. No. 3, 2002 SCC 1, at para. 72, the Supreme Court explained that "the Refugee Convention . . . expresses a 'profound concern for refugees' and its principal purpose is to 'assure refugees the widest possible exercise of . . . fundamental rights and freedoms'".
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> [63] As submitted by CARL and UNHCR, the principle of non-refoulement applies not only to recognized refugees, but also to asylum seekers whose status has not yet been determined. Refugee protection is not limited to those granted refugee status but applies equally to asylum seekers.
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> . . . . .
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> [68] Children are entitled to protection as they seek asylum. The application judge erred by ordering their return under s. 40(3) of the *CLRA* before the determination of the refugee claim.
>
> . . .
>
> [70] First, it is the s. 40(3) return order that would engage the non-refoulement principles, not the s. 23 analysis. …

> [71] Section 40 confers broad powers on the court and unlike the terms of the Hague Convention, does not require a return of the child to his or her habitual residence absent engagement of the harm exception.
>
> [72] A return order must not be made under s. 40(3) in the face of a pending refugee claim. This is consistent with the submissions of Amnesty, CARL and the UNHCR, all of whom stressed that it was the execution of the removal order under s. 40(3) that extinguishes the refugee claim. **(I would leave to another day how the court should proceed if a return order to a signatory country was sought under the Convention in the face of a pending refugee claim.)**
>
> [Emphasis added]

[57] The Ontario Court of Justice in ***G.B. v. V.M.***, 2012 ONCJ 745 (CanLII), considered that province's Court of Appeal's decision in ***A.M.R.I.*** and stated at paragraphs 68 to 70:

> [68] In *A.M.R.I. v. K.E.R.*, (2011) 2011 ONCA 417 (CanLII), O.J. 2449, the Ontario Court of Appeal found that "when a child has been recognized as a Convention refugee by the IRB, a rebuttable presumption arises that there is a risk of persecution on return of the child to his or her country of habitual residence. A risk of 'persecution' in the immigration context clearly implicates the type of harm contemplated by art. 13(b) of the Hague Convention." The court recognized that even if a risk of persecution was established before the IRB, that there was no duty under the Hague for a court to refuse a return order, but cautioned that a child found to be a refugee had a prima facie entitlement to protection against refoulement.
>
> [69] While it might be attractive to delay a decision on this application until E.'s refugee application has been determined, caselaw has established that a court hearing a Hague application is not required to and in fact should not delay dealing with the application until determination of a related refugee claim. The purpose of the Hague Convention would be defeated if applications for return of abducted children were not dealt with expeditiously. There are several cases in which an abducting parent has had a refugee claim pending, in which a court has decided a Hague application and a related 13(b) claim.
>
> [70] Given the Court of Appeal's decision in *A.M.R.I. v. K.E.R.*, I must consider the possibility that E.'s refugee application might succeed. The refugee hearing will not take place until sometime in early 2013. I cannot know what the outcome of this claim might be. It is possible that the claim would be successful. The Respondent's stepdaughter and her husband, Mr. and Mrs. Szcusik, were accepted as refugees by the IRB in March of

> 2012 based on their evidence that they were attacked and threatened because of their work with disadvantaged Roma children, including some work done at the request of Respondent.

[58] The Manitoba Central Authority argued that, in the context of an undetermined application for refugee protection, the hearing before this Court, with sworn or affirmed evidence from both parties, provides a fair, evidence-based means to consider the mother's allegations of domestic violence and determination whether same establish an Article 13(b) (grave risk of harm) exception to the mandatory return provisions of the Hague Abduction Convention. It would also meet the Convention's requirements for prompt determination of requests for return.

[59] Unlike an Immigration and Refugee Board proceeding, I have comprehensive sworn or affirmed evidence before me from both parties, including the mother's refugee applications, in addition to the sworn or affirmed evidence of other individuals from Italy. This Court is best placed to consider the evidence of both parties in totality and determine whether there is a grave risk that an order for the child's return to Italy would, on the basis of the domestic violence allegations of the mother, "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" within the meaning of Article 13(b) of the Convention. The hearing can also occur promptly, a key component of the meaningful and effective operation of the Convention and addressing the best interests of children.

[60] The ***Office of the Children's Lawyer v. Balev***, 2018 SCC 16 (CanLII), [2018] 1 S.C.R. 398, as well as ***Thomson v. Thomson***, 1994 CanLII 26 (SCC), [1994] 3 SCR 551, and a multitude of other decisions in Canada and other state parties to the Hague Abduction Convention, stress the importance of prompt determinations of applications for the request of the return of children.

[61] In the ***Office of the Children's Lawyer v. Balev***, McLachlin C.J. (as she then was) stated at paras. 23 to 27:

> [23] The harms the *Hague Convention* seeks to remedy are evident. International child abductions have serious consequences for the children abducted and the parents left behind. The children are removed from their home environments and often from contact with the other parents. They may be transplanted into a culture with which they have no prior ties, with different social structures, school systems, and sometimes languages. Dueling custody battles waged in different countries may follow, delaying resolution of custody issues. None of this is good for children or parents.
>
> [24] The *Hague Convention* is aimed at enforcing custody rights and securing the prompt return of wrongfully removed or retained children to their country of habitual residence: see Article 1; *Thomson v. Thomson*, 1994 CanLII 26 (SCC), [1994] 3 S.C.R. 551, at pp. 579-81. The return order is not a custody determination: Article 19. It is simply an order designed to restore the *status quo* which existed before the wrongful removal or retention, and to deprive the "wrongful" parent of any advantage that might otherwise be gained by the abduction. Its purpose is to return the child to the jurisdiction which is most appropriate for the determination of custody and access.
>
> [25] Prompt return serves three related purposes. First, it protects against the harmful effects of wrongful removal or retention: see R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (2013), at p. 96; E. Gallagher, "A House Is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence" (2015), 47 *N.Y.U.J. Int'l L. & Pol.* 463, at p. 465; *Thomson*, at p. 559; *Re B. (A Minor) (Abduction)*, [1994] 2 F.L.R. 249 (E.W.C.A.), at p. 260.
>
> [26] Second, it deters parents from abducting the child in the hope that they will be able to establish links in a new country that might ultimately award them custody: see E. Pérez-Vera, "Explanatory Report", in *Acts and Documents of the Fourteenth Session (1980)*, t. III, *Child Abduction* (1981), at p. 429; see also *W. (V.) v. S. (D.)*, 1996 CanLII 192 (SCC), [1996] 2 S.C.R. 108, at para. 36; Gallagher, at p. 465; A. M. Greene,

> "Seen and Not Heard?: Children's Objections Under the Hague Convention on International Child Abduction" (2005), 13 *U. Miami Int'l & Comp. L. Rev.* 105, at pp. 111-12.
>
> [27] Finally, prompt return is aimed at speedy adjudication of the merits of a custody or access dispute in the forum of a child's habitual residence, eliminating disputes about the proper forum for resolution of custody and access issues: see Schuz, at p. 96; Gallagher, at p. 465.

[62] To allow a parent's refugee application for their child to stay Hague Abduction Convention applications for the return of wrongfully removed or retained children, would, to use an oft-referred to expression, "drive a coach and four" through the Convention and gravely endanger achievement of those important objectives noted by the Supreme Court of Canada. It would significantly delay consideration of requests for return involving non-Canadian children. Even if the parent's refugee application was unsuccessful, considerable time would pass before that determination was made. A haven would be created for parental child abductors.

[63] The approach the mother urges me to take would also provide an unfair advantage to parties entering Canada with non-Canadian children. A refugee claim can be made for a non-Canadian child. No such option exists for a child with Canadian citizenship who is habitually resident outside of Canada and wrongfully removed to, or retained in, this country within the meaning of the Hague Abduction Convention. Those children can be promptly ordered returned to the state of their habitual residence notwithstanding their Canadian citizenship (***Kovacs***, at para. 117).

REQUEST FOR ADJOURNMENT – VOICE OF THE CHILD REPORT

[64] Article 13 of the Hague Abduction Convention provides that the Court may "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."

[65] The mother sought an adjournment to enable a "voice of the child" report to be prepared. She argued such a report was important for a number of reasons, for the Court to hear the child's views respecting return to Italy, as well as to confirm her allegations of domestic violence (relevant for her refugee claim as well as her argument that Article 13(b) and Article 20 exceptions exist to the return requirements in the Hague Abduction Convention).

[66] The mother relied on ***A.M.R.I.*** and ***Borisovs v. Kubiles***, 2013 ONCJ 85 (CanLII), in support of her argument that Aviraj be able to provide his views through a "voice of the child" report. While it is true that both of those cases made strong statements about hearing the voice of a child and the intersection with Article 20 of the Convention, and ***Borisovs*** involved an eight-year-old child, they involved children who, unlike Aviraj, had been granted refugee status.

[67] At paragraph 25 of ***R.M. v. J.S.***, 2013 ABCA 441 (CanLII), the Court referred with approval to the comments of the Ontario Court of Justice respecting determination of a child's degree of maturity for purposes of Article 13 of the Hague Abduction Convention:

[25] … Determining the level of maturity of a child, particularly one who had recently turned 10 years old, is a difficult matter calling for some expertise. The task was described by Glenn J. in *MLE v JCE (No 2)*, 2005 ONCJ 89, at paras. 12-13:

> It would seem to me that, if one were to even consider the views of a child who was as young as age ten in the context of an Article 13 argument, the level of maturity would have to be quite extraordinary. The court might look at some of the following earmarks of maturity, such as:
>
> 1. whether this child had made good decisions of a substantial nature for herself in other situations;
>
> 2. whether she had the ability and opportunity to, and in fact had reasonably weighed the more important competing benefits and disadvantages in reaching her decision;
>
> 3. whether her decision was reached with a reasonable measure of independence;
>
> 4. whether her fears relating to returning to the home state appear reasonable, in the circumstances—in particular in this case:
>
> (a) whether she had considered and understood that, even if the court acted on her wishes and allowed her to stay in Canada, her two younger sisters might have to return to England and leave her behind;
>
> (b) whether she had considered not only the scenario of living with her mother if she were to return to England, but also, the alternative of living with her father if she were to return to England pursuant to any order of this court; and
>
> (c) whether she had a reasonable appreciation of the potential consequences of her decision, should the court act on her views, especially in regards to her future relationship with her mother.

These are tall orders for a young child. The stronger the evidence that a child had touched some of these bases, the greater would be the court's comfort level in relying on this young child's views. Most ten-year-old children are never put in the position of having to demonstrate this level of maturity. In fact, one would never expect parents to place their child in a position of having to live with the consequences of making important "life" decisions using their as-yet undeveloped judgment. As children reach their teen years, assumptions can more readily be made about their maturity

> since they more regularly have opportunities to make important decisions for themselves on matters that younger children should never have to contemplate.

[68] Our Court previously dealt with the issue of seeking the views of young children for purposes of Article 13 of the Hague Abduction Convention in ***Garcia Perez v. Polet***, 2014 MBQB 151 (CanLII), a case that also involved an eight-year-old child. In that proceeding, Allen J. stated:

> [57] I turn now to the question of the child's views and whether they should be considered to some degree or at all. On this topic, Article 13 of the *Convention* states:
>
> > 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.
>
> [58] The child is 8 years and 4 months old. In Manitoba, the court is fortunate to have Family Conciliation Services available to it. Family Conciliation is an arm of the specialized court in which this case was heard, the Family Division of the Court of Queen's Bench. Family Conciliation offers a mechanism, in appropriate cases, to allow the child's or children's voice to be heard in a safe and comfortable environment for the child by way of a Brief Consultation. Both parents must agree to send the child there. This is a meeting for the child alone in a safe and neutral environment with a social worker highly trained in custodial conflicts.
>
> [59] Most applicable to this case, I note Family Conciliation has set certain criteria for the age limit for an attendance with them for the purpose of allowing a child to be heard in that safe and neutral environment. They have set the minimum age limit at 11 years of age. Sometimes, should there be older siblings who meet the age criterion, they will meet with a younger sibling as well, but that is rare.
>
> [60] Clearly then, **this court generally finds that it is inappropriate to be seeking the views of children younger than 11 as to their wishes**. Indeed, the very act of asking might put the child in an intolerable situation of feeling forced to choose between parents or indeed, even having the suggestion put to them that he or she might have that option might be extremely unsettling or damaging to a young child.
>
> [61] In the cases cited by the mother, ***Droit de la Famille - 112477***, *supra*, and ***I.(A.M.R.) v. R.(K.E)***, 2011 ONCA

> 417, 106 O.R. (3d) 1, both children were around 14. In both cases, the child had a lawyer to speak for her: whether on a best interests retainer or as counsel taking instructions is not clear. In the Ontario case, the child, a refugee, almost 14 and having lived in Canada for 18 months with her aunt, was not aware of the hearing; nor were her views and preferences before the court at first instance. Further, the case was dealt with on a one-sided or ex parte basis. The removal order was therefore overturned.
>
> [62] In the Quebec case, as discussed earlier, it was clear that the court found the 14 year old to be articulate and firm in her wishes not to be returned.
>
> [63] It is a well settled principle that the degree of deference the court gives to children's wants/wishes is a moving target. Certainly, the older the child (in the 14-17 range) the higher the degree of deference given to the child's opinions, hopes and aspirations. In the mid-range (11-13), the court may likely take into account what the child has to say in coming to a child-centred decision, but the wants/wishes would by no means be determinative. **It would be a rare child, indeed, younger than 11, who would have the necessary maturity and emotional understanding and strength to articulate his or her wishes in a meaningful way**.
>
> [64] **In my view, an 8 year old and in particular, this 8 year old, should not be have been involved in her parents' legal dispute**. However, she is. She has told a counsellor how she feels about it. I am now aware of how she felt on that particular day in that particular counselling set-up. This is in no way determinative. In fact, in my view, the validity and relevance of her opinion is highly questionable given that the appointment was set up by the people on which she depends, the father was not consulted and the instructions to the counsellor or the background information provided to her was not set out. Clearly, given the counsellor's parroting of the words of the Hague *Convention*, someone other than Mikaela must have set the agenda for the appointments to some degree.
>
> [65] In all of these circumstances, I find that Mikaela has not attained an age and degree of maturity at which it is appropriate to take account of her views.
>
> [Emphasis added]

[69] Aviraj turned eight years of age on August 2, 2021. Until arriving in Canada on September 29, 2021, he lived his entire life in Italy, in a three bedroom apartment with his parents, paternal grandparents, aunt, uncle and cousin. He

slept in the same bedroom as his parents. He speaks Punjabi and, at least at school, Italian. Like children all over the globe, he attended school virtually for a period of time due to the COVID-19 pandemic. Remote learning impacted his Italian language skills so he was working with a tutor to improve them.

[70] In her refugee application the mother indicated that she consulted with the child's school to see if he could miss school for a month. She indicated the director told her "this was okay, however if he were to miss more than one month he would fall behind." Aviraj was in his third year of school.

[71] Aviraj has not attended school since he arrived in Canada. He has lived in an apartment in downtown Winnipeg with his mother and her cousin. No evidence was provided about his other social interactions. He does not speak English.

[72] It was not until the initial hearing date on January 27, 2022 that any arrangements were in place for Aviraj to have contact with his father.

[73] The mother's counsel approached the Family Resolution Service (the Manitoba Department of Justice program that now prepares the Court-ordered assessment reports formerly prepared by Family Conciliation) about the possibility of preparing a "voice of the child" report. They were unwilling to do so given the child's age.

[74] Similarly the Aulneau Renewal Centre was unwilling to do so noting, among other concerns "the report would be of limited value given the child's young age (8)."

[75] The mother's counsel was able to identify a potential professional (through a recommendation from Ms. Rosemary Somers, another assessor) who spoke Punjabi and was willing to prepare a "voice of the child" report (albeit with assistance and input from Ms. Somers).

[76] Interestingly, although she urged me to allow Aviraj to express his views in the Hague Abduction Convention proceeding, the mother did not arrange for the child to directly provide input for the refugee claim she made on his behalf. The February 7, 2022 affidavit of Audrey Limon, a legal assistant from Mr. Davis' firm, stated that the information on the refugee application claim form was solely provided by the mother. It is unclear how Aviraj could possibly have "attained an age and degree of maturity at which it is appropriate to take account of [his] views" for purposes of the Hague Abduction Convention proceeding but not for the refugee application.

[77] Given Aviraj's young age, his clearly sheltered and rather insular upbringing, his only current connection to his past and long-term contact being his mother, and his separation and lack of contact with his father until at least the end of January, 2022, I am not satisfied that he "has attained an age and degree of maturity at which it is appropriate to take account of [his] views" or that it would be in appropriate or in his best interests for me to him to provide other evidence.

HAGUE ABDUCTION CONVENTION REQUEST FOR RETURN

[78] An overview of the Hague Abduction Convention appears at paragraphs 21 to 29 of this decision.

[79] The Hague Abduction Convention provides a mechanism for the prompt return of wrongfully removed or retained children to the state of their habitual residence for the Courts in that jurisdiction to address issues respecting their custody.

[80] The father alleges that Aviraj was wrongfully removed from Italy and has requested the return of the child to that country.

[81] Although the mother conceded that Aviraj was habitually resident in Italy, and the father had and was exercising rights of custody, on the day of the alleged wrongful removal, there must be a determination by the Court whether the Hague Abduction Convention applies and, if so, whether the removal of the child was wrongful, before the provisions of the Convention requiring return of a child to the state of his habitual residence come into play.

[82] Article 3 and Article 4 of the Hague Abduction Convention provide:

> 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 4
>
> The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

[83] Aviraj is eight years old and resided in Italy from the time of his birth in August of 2013 until his removal on September 29, 2021. As conceded by the mother, there is no question that the child was habitually resident in Italy on the date of the mother brought him to Canada, the date of the alleged wrongful removal.

[84] The mother also concedes that on that date the father had, and was exercising, rights of custody. The evidence clearly supports her concession.

[85] The Italian Central Authority provided evidence of the relevant provisions of the Italian Civil Code relating to parental responsibility, including decision-making authority. It provides, *inter alia*, "Major decisions concerning … children's habitual residence shall be jointly made by both parents. … Should the parents disagree, such decisions shall rest with the Judge."

[86] Both Canada and Italy have been "contracting states" to the Hague Abduction Convention for decades, long before Aviraj was even born.

[87] Taking the evidence and the mother's concessions into account, I find that the requirements of Article 3 and 4 are satisfied and the Hague Abduction Convention applies to the child in this proceeding. Aviraj is under the age of 16 years. He was habitually resident in Italy (a Contracting State) and the father had,

and was exercising, rights of custody on the day of the child's alleged wrongful removal.

[88] Article 12 of the Hague Abduction Convention requires the prompt return of wrongfully removed children, subject to certain exceptions set out in Article 13 and Article 20.

[89] The relevant portions of Article 13, and Article 20 of the Hague Convention provide:

> Article 13
>
> Notwithstanding the provisions of the preceding Article, the judicial … authority of the requested State is not bound to order the return of the child if the person … which opposes its return establishes that –
>
> a) the person ... 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 … 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. …
>
> 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.

[90] The mother bears the onus of establishing that an exception exists under Article 13(a) (consent), Article 13(b) (grave risk of harm) or Article 20 to the requirement for the child to be promptly returned to his state of habitual residence pursuant to the terms of the Hague Abduction Convention.

[91] The mother argued that the exception in Article 13(a) applies as the father consented to the removal of the child. She also argued, in addition or in the alternative, that returning the child to Italy would expose him to "physical or psychological harm or otherwise place [him] in an intolerable situation" within the meaning of Article 13(b) of the Hague Abduction Convention.

[92] The mother relied on the exception in Article 20 in the context of her request for a stay and/or adjournment of the father's application relating to her application for refugee status for herself and the child. Given my decision on that point, the outstanding arguments relate to Articles 13(a) and 13(b).

[93] The remaining issues in this proceeding therefore are:

a) Did the father consent to the child's removal from Italy?

b) Is there a grave risk that the return of the child to Italy would expose him to physical or psychological harm or otherwise place him in an intolerable situation?

c) If the answer to either of the foregoing questions is yes, should I nonetheless exercise my Article 18 discretion to order the return of the child to Italy?

Did the Father Consent to the Child's Removal from Italy?

[94] The mother argued that her removal of Aviraj from Italy was not wrongful because the father consented to the removal within the meaning of Article 13(a) of the Hague Abduction Convention.

[95] The mother stated that after the father travelled to Toronto, Canada in 2018 they discussed the possibility of moving to this country. The father said he told her Canada was a nice country but they never planned to move here from Italy. As previously noted, in her second affidavit the mother indicated the father intended to follow her and Aviraj to Canada and they would apply for work permits. No evidence was provided of any steps taken by either party to further any such alleged joint intention. The father denied any such intention.

[96] The mother deposed that the father knew of her plans to travel to Canada with Aviraj and that he even drove them to the airport on September 29, 2021.

[97] Her evidence was contradictory on a number of points. At one point she stated she bought the tickets three weeks before departure, at another the week before. The tickets were issued a week before she and the child departed from Italy.

[98] By her own evidence, when the mother left Italy with Aviraj on September 29, 2021, she did so for the purpose of a one month vacation to Canada. The child's airplane ticket reflected a return travel date of October 28, 2021.

[99] In her refugee application the mother repeatedly referred to her intention to return to Italy after a one month stay in Canada. She stated "My husband knew I bought tickets for my son and myself to fly to Canada, he was aware of our trip and he was aware that I would return in a month's time."

[100] She further stated that "I told [the father] how I wanted to visit my cousin in Canada with our son and he allowed me to so I purchased our tickets on

September 22nd, 2021 thru a Travel Agency. He was aware I purchased plane tickets for a one month visit with a return date of October 28th, 2021" (sic). She also indicated "I had full intentions to return to Italy after our trip."

[101] In ***Katsigiannis v. Kottick-Katsigiannis***, 2001 (CanLII), 24075 (ON CA), 55 OR (3d) 456, the Court stated:

> [37] Beginning with In re H. and others (Minors), [1996] H.L.J. No. 43, the House of Lords, in considering the application of Article 13(a) of the Hague Convention, rejected the characterization of acquiescence as being either active or passive and substituted a strict subjective test with one exception, which they described as extraordinary.
>
> [38] In In re H., Lord Brown-Wilkinson set out several principles to guide the proper interpretation of "acquiescence" in the context of Article 13(a) of the Hague Convention. He stated that the test is entirely subjective. That is, the answer to the question whether a parent has acquiesced in the removal or retention of a child will depend on that parent's state of mind -- not the outside world's perception of the parent's intentions. Lord Brown-Wilkinson noted that his approach -- the subjective intention approach -- is consistent with the one adopted in both the United States and France. In concluding, he referred with approval at para. 25 to Millett L.J.'s comments in In re R., [1995] 1 F.L.R. 716 (H.L.) at p. 733:
>
> Acquiescence is a question of fact. It is usually to be inferred from conduct; but it may, of course, be evidenced by statements in clear and unambiguous terms to the relevant effect.
>
> [39] Lord Brown-Wilkinson added at para. 35 that "attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child" will not generally constitute acquiescence for Hague Convention purposes. He also stated at para. 42 that "[t]he trial judge, in reaching his conclusion on that question of fact [the consent or acquiescence question of fact] will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. . . . [t]hat is a question of the weight to be attached to evidence and is not a question of law". I agree with this observation.
>
> [40] The exception that Lord Brown-Wilkinson carved out of the subjective test at para. 42 arises:
>
> [w]here the or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to a summary return of the child

> and are inconsistent with such return, justice requires that that the wronged parent be held to have acquiesced.
>
> . . .
>
> [46] The words "consent" and "acquiescence" as used in Article 13(a) of the Hague Convention should, in my view, be given their ordinary meaning so that they will be consistently interpreted by courts of Hague Convention contracting states. In any case, I can see no logical reason not to give those words their plain, ordinary meaning.
>
> [47] "Consent" and "acquiescence" are related words. "To consent" is to agree to something, such as the removal of children from their habitual residence. "To acquiesce" is to agree tacitly, silently, or passively to something such as the children remaining in a jurisdiction which is not their habitual residence. Thus, acquiescence implies unstated consent.
>
> [48] Subject to this observation, I agree with Lord Brown- Wilkinson's approach and analysis in In re H, supra. When Lord Brown-Wilkinson said that "[a]cquiescence is a question of the actual subjective intention of the wronged parent, not the outside world's perception of his intentions", he was, it seems to me, really speaking of the wronged parent's consent to a child's removal or retention based on evidence falling short of actual stated consent. That is what acquiescence is -- subjective consent determined by words and conduct, including silence, which establishes the acceptance of, or acquiescence in, a child's removal or retention.
>
> [49] To establish acquiescence in the Article 13(a) Hague Convention context -- "subsequently acquiesced in the removal or retention" -- the mother must show some conduct of the father which is inconsistent with the summary return of the children to their habitual residence. **In my view, to trigger the application of the Article 13(a) defence there must be clear and cogent evidence of unequivocal consent or acquiescence**. …
>
> [Emphasis added]

[102] Even if the mother's version of the arrangements for her trip to Canada with Aviraj are accurate, at most the father consented to a one month vacation. The father's agreement to a month long vacation does not constitute "clear and cogent evidence of [his] unequivocal consent" to the mother's removal of the child for an indefinite period. The mother's failure to return the child at the end of the period

of time she alleged the father agreed to would mean she wrongfully "retained" Aviraj in Canada after that date. (The mother conceded the father had not acquiesced to the child's retention in Canada.)

[103] There is "clear and cogent evidence" that the father did not consent to the child being removed to Canada and that he did not consent to the child remaining in Canada indefinitely.

[104] The father's actions clearly contradiction any conclusion that he was consenting to the mother removing Aviraj from Italy. He met with Italian police the very day the mother left with the child, at a time consistent with his version of events that day. He contacted the Italian Central Authority shortly thereafter and within days completed the documents requesting Aviraj's return to Italy. The documents were sent via e-mail to the Manitoba Central Authority after the child's location was confirmed in mid-November. If the father knew where the child was, why the delay?

[105] The father's Notice of Application seeking, *inter alia*, Aviraj's return to Italy was filed in this Court on November 18, 2021. In the request for return form he provided to the Italian Central Authority, and his affidavits of December 11, 2021 and January 13, 2022, the father has steadfastly expressed his desire that Aviraj be returned to Italy.

[106] Given the evidence, understandably the mother did not argue that the father had consented to, or acquiesced in, the child's retention in Canada after September 29, 2021.

[107] The mother has failed to meet the onus upon her to establish an exception within the meaning of Article 13(a). She has failed to satisfy me that the father consented to her removing Aviraj from Italy on September 29, 2021. If I am in error on that point, clearly the father did not subsequently consent to, or acquiesce in, Aviraj remaining in Canada and his retention by the mother after October 28, 2021 was wrongful.

Is there a Grave Risk that the Return of the Child would Expose Him to Physical or Psychological Harm or Otherwise Place Him in an Intolerable Situation?

[108] The mother argues that returning the child to Italy would expose him to physical or psychological harm or otherwise place him in an intolerable situation within the meaning of Article 13(b) of the Hague Abduction Convention.

[109] In her affidavits and her refugee application, the mother described a number of incidents of domestic violence during the parties' cohabitation. The allegations of abuse include verbal, financial and physical abuse, including name calling, threats, and threats of violence that might be committed against her by the father and some of his family members.

[110] Again there were inconsistencies with respect to her evidence. She describes acts of the father's parents during a period when the father indicated his mother was in India, not Italy, and she did not contest his evidence on that point. She gave inconsistent evidence about her own mother. She stated that the child began to sleep in the parties' bedroom because of his fears relating to domestic violence, then, after the father indicated the child had always slept in their room, stated she meant the child began sleeping in her bed. The mother stated she was

not allowed to leave the home on her own, yet she worked outside of the home for extensive periods of time during the marriage.

[111] Most tellingly, after describing the various acts of domestic violence, she indicated the parties' plan was that they would move to Canada together.

[112] Her evidence regarding why she cut off contact between Aviraj and the father after arriving in Canada was confusing. She stated she became afraid after hearing the father had contacted the police in Italy and "changed his mind" about coming to Canada. She implied direct contact with the father in December then corrected her evidence, indicating messages were exchanged through a third party. Her refugee application described those communications in a somewhat different manner. At the initial hearing before me she agreed to the father having contact with Aviraj.

[113] As I indicated in a Hague Abduction Convention case involving a request to return two children to the state of Iowa in the United States of America, ***Mbuyi v. Ngalula***, 2018 MBQB 176, at paragraphs 61 to 65 and 74:

> [61] There is a very high threshold for establishing an Article 13(b) exception to return (***Thomson v. Thomson***, 1994 CanLII 26 (SCC), [1994] 3 S.C.R. 551 (SCC)).
>
> [62] In determining whether or not a situation of alleged domestic violence is of such a nature that return of the children would expose them to physical or psychological harm or place them in an intolerable situation, the Court must in any Hague *Convention* proceeding start from the basis that, except in the most extraordinary of cases or where evidence is sufficient to establish the contrary, the Courts and the authorities in the state of the children's habitual residence will be able to take measures to protect the children, including protecting their mother from any domestic violence.

[63] In ***Ellis v. Wentzell-Ellis***, 2010 ONCA 347, the Court allowed an appeal in a Hague *Convention* case where the application judge had relied on Article 13(b) in refusing to order the return of a child to England. LaForme J.A. ended the decision with the following statements at paragraph 50:

I would conclude with this reminder. It must be appreciated that the court would not be forcing the mother or the child to return to live with the father. Rather, an order that the child be returned to England simply recognizes that the mother was not entitled to take the child from England and that custody proceedings should be decided by English courts. **Aside from recognizing that English courts are the appropriate forum to determine the merits of the custody case, a return order also recognizes and trusts that those courts are capable of taking the necessary steps to both protect and provide for the mother and the child in the present case. This is what underlies art. 13(b) and why there is such a high threshold for parents wishing to justify removing their children from one contracting state to another.**

[Emphasis added in the original]

[64] Without question, in some cases the nature of domestic violence will result in findings that return would expose a child to physical or psychological harm or otherwise place them in an intolerable situation within the meaning of Article 13(b) of the Hague *Convention*.

[65] Cases where the Court has found this to be the situation have generally involved clear evidence of domestic violence, including some or all of the following circumstances: photographs of injuries, third party (including police) evidence of violence, medical evidence of injuries, the granting of, and, in some cases, breaching of civil protection orders or probation orders, criminal charges or convictions for abusive conduct, inability of the efforts of police or other authorities to restrain the abuser's behaviour, the abuser's disregard for court orders, abuse of the children. (See, for example, the situations in ***Callicutt v. Callicutt***, 2014 MBQB 144; ***Lombardi v. Mehnert***, 2008 ONCJ 164; ***Achakzad v. Zemaryalai***, 2010 ONCJ 318; ***Pollastro v. Pallastro***, 1999 CanLII 3702 (Ont. C.A.)).

. . . . .

[74] As stated by the Ontario Court of Appeal in ***Ellis v. Wentzell Ellis*** (and in many other cases), it must be remembered that an order for the return of the children to their habitual residence, in this case the United States of America, and in particular Iowa City, Iowa, is not an order that they be returned to the care of their father. It is an order that they be returned to their place of habitual residence so that the Court in that State can, considering the evidence adduced by each of the parents, consider what custody order would be in

> the children's best interests and what other orders might be appropriate. The parents may wish to raise other related family law, or civil protection, issues. The mother may wish to seek permission to change the children's place of residence to Canada. The father may wish to seek an order that the children remain in Iowa. All of those issues are best addressed by the Iowa Court.

[114] With the exception of contacting and meeting with a social worker in early 2021, the mother provided no evidence that she had taken any steps to address the issues she alleges. There was no evidence she contacted the social worker again. There was no evidence she contacted the police. She stated she did not do so because she felt she would not be believed and no action would be taken. There was no evidence that the mother consulted with, or received advice from, a lawyer in Italy. Other than general statements, no particulars of events or medical reports were provided.

[115] While alleging domestic violence, the mother's evidence was that she expected the father to follow her and Aviraj to live in Canada and they would both apply for work permits.

[116] The Italian Central Authority has confirmed that the Italian Court has the authority to "issue protection orders on behalf of [the mother] and her minor child, if need be." They also noted the possibility of "free legal aid" for civil proceedings and provided the legislation applicable to parental authority (including that orders be made in accordance with the child's best interests) and child support.

[117] While the alleged death threats by the father and his family, and slaps by the father and his father, described by the mother (and denied by the father and his family) are certainly serious, the Italian Court and law enforcement agencies

should be trusted to take measures to protect Aviraj, including protecting his mother from any domestic violence, if the evidence presented so warrants. There was no evidence that the mother had ever asked either to do so.

[118] The events that the mother alleges occurred in Italy, the country where the witnesses to those events are available. The Courts in Italy are best placed to determine the actual circumstances of this case and what custody order is in the best interests of Aviraj or what civil protection orders might be appropriate.

[119] As with the Article 13(a) exception, the mother bears the onus of establishing that an exception to the return of the child exists within the meaning of Article 13(b). She has not met that onus.

[120] Having found that the mother has not met the onus upon her to establish an exception to the return of the child under either Article 13(a) or Article 13(b), the issue of whether I should exercise my Article 18 discretion to order the return of the child despite the existence of one of those exceptions, does not arise.

ORDER

[121] The father's request for the return of the child Aviraj to Italy pursuant to the Hague Abduction Convention is granted.

[122] As the mother did not previously indicate whether she would return to Italy with the child, I order that she confirm, through counsel, to the Manitoba Central Authority, by 2:00 p.m. on March 10, 2022, whether she intends to do so.

[123] If the mother does not intend to return to Italy with the child, the father is to forthwith make arrangements to travel to Winnipeg to pick up the child, provide

notice of the date of his anticipated arrival, through counsel, and the mother is to ensure the child is placed in his care no later than noon the following day. He will have authority to travel back to Italy with the child.

[124] If the mother intends to return to Italy with the child, she is to purchase tickets by 2:00 p.m. March 12, 2022 for her return travel and that of the child to Italy, leaving Canada no later than March 24, 2022, and arriving in Italy due to the time difference, no later than the day following her departure from Canada. She is to provide particulars of the travel arrangements, through counsel, to the Manitoba Central Authority, and she and the child are to travel on the scheduled flights (subject to any flight changes by the airline(s), in which case she is to provide details of the change(s) through counsel, to the Manitoba Central Authority, forthwith upon being advised of same).

[125] The mother is to be responsible for all travel costs for the return of the child to Italy.

[126] Within 24 hours of her arrival in Italy with the child, the mother is to advise the Italian Central Authority of their presence in Italy and provide her contact details for future Court proceedings in that state.

[127] The father, in consultation with his lawyer, confirmed and undertook that he would respect and comply with any directions I pronounced with respect to the return of the mother and Aviraj to Italy, including his contact with the mother and child pending a future order from the Italian Court. He undertook to pay for separate accommodation for the mother and child and to provide support to them

for a period of four months after their return, if the mother did not want to return to the family home.

[128] Upon being notified of the mother and child's anticipated arrival date, unless the mother advises she will be returning to the family home, the father is to forthwith arrange and pay for separate accommodation for the mother and child, and deposit funds in her personal bank account to cover their food and other living expenses for four months, providing particulars of the accommodation and funds to the mother, through counsel.

[129] Pending further order from the Italian Courts, or written agreement with the mother, the father is not to have direct contact with the mother and the child, including attending at the airport when they arrive in Italy or at the separate accommodation he arranges for them. The father is to ensure that the mother is notified of any proceedings he commences in the Italian Courts so she can appear and provide submissions to the Court.

[130] These directions and time periods should enable the mother to at least commence the process of retaining counsel in Italy in the event she wishes to initiate civil proceedings in the Italian Court for orders of protection, custody, support or other family-related relief, and the parties to seek the assistance of the Italian Courts and possibly be granted a temporary order pending a full hearing, should such a remedy be available and the Italian Court feel that appropriate and in the child's best interests.

[131] The mother's and the child's passports presently being held for safekeeping by this Court are to be released to her counsel upon presentation of a signed copy of the Order incorporating the terms of this decision. The documents shall be released to the mother by her counsel no earlier than one business day before she is to depart with the child for Italy.

[132] The mother's counsel shall advise counsel for the Manitoba Central Authority when his office has released the passports to the mother.

[133] There will be a peace officer assistance clause.

[134] The father's application having been dealt with on a final basis, the non-removal, residency and passport provisions in the November 30, 2021 Interim Order are no longer in effect.

_____ J.