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Citation: *G.B. v. V.M.*, 2012 ONCJ 745

# ONTARIO COURT OF JUSTICE

**B E T W E E N :**

**G.B. (father)**
***Applicant***

**— AND —**

**V.M. (mother)**
***Respondent***



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Before Justice E.B. Murray
Heard on November 13, 2012
Reasons for Judgment released on November 30, 2012

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**Nancy Chaves ..... for the applicant**
**Glenda Perry ..... for the respondent**
**Annemarie Carere ..... for the Office of the Children's Lawyer, legal representative for the child**

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**MURRAY J.:**

**[1]** The parties are the father and mother of the child E. B., born […], 1998. On November 26, 2011, without notice to the Applicant, the Respondent mother removed E. from her home in Budapest, Hungary, and travelled with E., her two other children, and her husband, G. BE., to Toronto. She and Mr. BE. commenced an application seeking refugee status; the Respondent also caused refugee applications to be filed for her children, including E..

**[2]** The Applicant father seeks an order under the Hague Convention on International Child Abduction directing that E. be returned to Hungary.

**[3]** The Respondent mother resists the application, arguing that, although she may have wrongfully removed or retained the child, both article 13 and article 20 of the Convention provide exceptions under which the court may and should decline to order the child's return.

**[4]** As will be seen below, after the Respondent took E. from Hungary, the Hungarian court made a final order granting custody to the Applicant. The Applicant has undertaken, if a return order is made, to consent to a reopening of this proceeding if the Respondent wishes to claim custody. The Respondent's counsel says that this concession is irrelevant to the Respondent, as she will not return to Hungary or attempt to litigate in Hungary.

**[5]** At the Respondent's request, I made an order requesting the assistance of the Office of the Children's Lawyer (OCL), which appointed counsel to represent the child. Counsel was assisted by a clinical investigator, Ms. Judith Szende, who provided an affidavit setting out E.'s views expressed in the seven meetings held with the child, as well as the results of her contact with the parents and some collateral sources. The OCL took no position on the relief requested, and advised as follows:

- E. expresses a wish to remain with the Respondent in Canada.
- E. also expresses ambivalence about the issue of remaining in Canada with Respondent versus returning to Hungary and the Applicant.
- The Respondent appears to have attempted to influence E.'s wishes in this regard.

**[6]** This hearing was conducted on the basis of documentary evidence–affidavits and Hungarian court orders and the reasons for those orders[1]. I received hearsay evidence in various forms, with the consent of counsel, subject to argument about weight. The hearsay evidence included:

- Reports from third parties and from the Athena Institute, purporting to give information about the treatment of Roma in Hungary; these reports were referenced in affidavits filed by Respondent from herself and from Karolyne Harmori.
- Affidavits from a staff member in the office of the Applicant's solicitor, repeating on information and belief statements made by the Applicant[2].
- An affidavit from Ms. Szende containing reports of interviews with the parties, the child, and various collateral sources.

**THE FACTS**

**[7]** The parties and the child are all Hungarian citizens. The Respondent is of Roma heritage, and well-known in Hungary as a human rights activist for Roma people. Except for a period of about one year in 2004, E. lived in Budapest her entire life, until she was removed by the Respondent last November.

**[8]** The parties were married in Budapest on December 2, 2000. They adopted E as their daughter in 2001; E. is of Roma ethnicity. The parties separated in 2003, and the child began spending roughly equal periods of time with each parent.

[1] Only those translated into English. Although the Respondent and Ms. Szende at times attempted to "summarize" Hungarian court documents for me without translations, I did not rely on those summaries.

[2] Counsel advised that she had in fact observed the Applicant execute these affidavits via Skype.

**[9]** In 2004 the Respondent was elected to the European Parliament, and began spending approximately one-half of each week in Brussels.

**[10]** After the parties' separation, the Respondent adopted E.'s biological sibling, K. M. ("M."), born […], 2001. The Respondent formed a common law relationship with G. BE., who at the time was working as her bodyguard. She gave birth to Mr. BE.'s child, L., on November 28, 2005. She and Mr. BE. married in 2011.

**[11]** When the Applicant and the Respondent began cohabiting, the Applicant worked for the Hungarian government on Roma issues. He says that he has worked on these issues for 16 years. He is not of Roma ethnicity. In 2008, the Applicant married H. N.. Ms. N. gave birth to a child, A., in 2011, after E. was removed from Hungary. The Applicant is now working on a doctoral degree, and does occasional consulting for a Roma non-governmental organization.

**[12]** As E. told Ms. Szende, the parties have been in court in litigation concerning her for much of the past seven years. My picture of this litigation and the changes in E.'s residential pattern is pieced together from their affidavits, Hungarian court documents, and the interviews reported by Ms. Szende; I cannot say that it is a complete record.

**[13]** On June 17, 2005, the Hungarian court made an order on consent granting the parties joint legal custody of the child, with her primary residence to be with the Respondent. The child regularly spent time with the Applicant on evenings and weekends. The June 17, 2005 order contained a provision allowing each parent to take the child out of Hungary for periods of up to two weeks without the other parent's prior consent.

**[14]** In 2007 E. moved to Brussels with the Respondent, but returned to Budapest every two weeks to spend time with the Applicant.

**[15]** In June 2008, at the Respondent's initiation, E. moved to live primarily with the Applicant, spending time with the Respondent on alternate weekends. No change, however, was made in the court order.

**[16]** In November 2008, the Applicant began proceedings to change the order to reflect the child's actual schedule. This was opposed by the Respondent, who returned to Budapest in June 2009 and invoked the terms of the 2005 court order. E. returned to live primarily with her, and resumed a regular access schedule with the Applicant. In 2009 the court decided that the original 2005 schedule should not be varied.

**[17]** At the time the Respondent removed E. from Hungary, there was a case in the Hungarian court in which each party sought to change the child's residential arrangements. It is unclear when this round of litigation started. Transcripts and documents from this litigation reveal at least two issues: the Respondent's allegation that the Applicant was sexually abusing E. (by bathing and sleeping with the child), and the Respondent's complaint that she could not find work Hungary, and her desire to have legal authorization to take the child to a

country in which she could find employment. The Applicant denied any inappropriate behaviour with the child, and objected to her removal from Hungary.

**[18]** In August 2011 the Applicant gave evidence that Respondent had told him that she wished to "work abroad" and to take E. with her. He said that E. had moved schools frequently because of the Respondent's frequent moves, that the child had been behind in school because of these moves (but had caught up after he had worked with her for a summer), and that further moves were not in her best interests. The Applicant took E. to the government Guardianship office; E. was interviewed, and gave a statement objecting to being removed from Hungary by the Respondent, stating that she wished to remain in Hungary with her father.

**[19]** On September 2, 2011, the Respondent told the Hungarian court that she had received a job offer in Ireland which she did not accept because Mr. BE. had suffered a stroke.

**[20]** On September 26, 2011, the Respondent complained to police about the Applicant's alleged inappropriate behaviour with the child, and a police investigation began.

**[21]** When the case came back before the Hungarian court on October 17, 2011, the Respondent told the court that she had been looking for employment for two years without success and that "employment abroad is my unconcealed intention". She asked that the court modify the Applicant's time with E. to allow this.

**[22]** At the October 2011 hearing, at the Respondent's request, the Hungarian court appointed a psychologist to do what we might call a family assessment involving the child, the parties, and their current partners. A lawyer was also appointed for the child.

**[23]** The case was adjourned to December 14, 2011.

**[24]** The Respondent removed E. from Hungary on November 26, 2011. E. was told that they were going on a vacation; the Respondent did not reveal the true purpose of the flight to the child until they were in the air.

**[25]** On December 14, 2011, the Hungarian court learned of Respondent's removal of E.. The assessment was not completed because the Respondent and E. had left the country. The court made a final order, dissolving the order of joint custody, placing E. in the Applicant's custody, and providing for regular access to the Respondent on weekends and vacation periods.

**[26]** The court in reaching its decision noted that it received evidence from the parties, their respective partners, and some family friends. It also considered E.'s school reports and statements from her teacher as well as a family assessment conducted during previous litigation in 2007. In its reasons, the court made the following comments:

- E. has been subjected to significant instability to her life, and much of this instability is due to the "unilateral decisions" of the Respondent. These decisions had shifted E.'s primary residence between the Respondent and the Applicant, and had entailed frequent moves (within Budapest, and to Brussels), and had caused frequent changes of school.
- Both the parties had testified that E. was exhibiting "signs of insecurity and anxiety", which the court attributed to the instability in the child's life.
- At least in part because of this instability, E. had been behind in school. The Respondent had secured a tutor and had worked with the tutor and the child, and she seemed to be catching up.
- The Respondent's unilateral decision to take E. out of the country shows insensitivity to the child's emotional needs for security. The move separates E. from her father, her family in Hungary, her school and her friends. The move has taken her to a country in which she does not speak the language.
- The Applicant has in the past demonstrated an ability to make E.'s needs a priority. He has structured his work time in order to be available for her. When the parties had a conflict about what school E. should attend, the Applicant appreciated that it was important for E. to be able to attend the same school as M., and agreed to the Respondent's proposed school, even though that meant that E. would spend less time with him.
- E. has a strong bond with the Applicant.
- E. has stated to the Guardianship office that, if her mother left Hungary, she wants to stay with her father in Budapest. The court noted that she had previously experienced living with her mother outside Hungary (in Brussels), and that her opinion was based on some experience.

**THE CONVENTION**

**[27]** Article 1 of the Hague Convention sets out its objects:

"(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."

**[28]** Given these purposes, an application under the Hague Convention "does not engage the best interests of the child test" which is applicable in custody and access cases.[3] An underlying principle shared by contracting states was identified by the Ontario Court of Appeal in *Ellis v. Ellis-Wentzel*, 2010 ONCA 347; "each contracting state acknowledges that it is the courts of the country in which the child was habitually resident before his or her wrongful removal or retention that are, in principal, the best place to decide questions of custody and access."

[3] Katsigiannis v. Kottick-Katsigiannis, 144 O.A.C. 387; Thomson v. Thomson, (1994) 3 S.C.R. 551

**Is there a basis for a return order?**

**[29]** Article 3 of the Convention 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.

- "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."

**[30]** Article 12 of the 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. 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."

**[31]** It is not contested that the Applicant began his application within the one-year period.

**[32]** The Respondent concedes that:

- E. was habitually resident in Hungary on November 26, 2011, when she was removed from that country.
- At that time, the Applicant enjoyed rights of custody to E. pursuant to Hungarian law by virtue of the order of joint custody made in 2005.

**[33]** The Respondent contends, however, that she did not wrongfully remove the child, as the 2005 order allowed each party to take the child out of Hungary for up to two weeks without the consent of the other parent. She further submits that the child was not wrongfully retained after that two-week period expired, because under Canadian law she was unable to remove E. from Canada. By that time the Respondent had initiated a refugee application for

E. and was required to deposit the child's passport with immigration authorities. As refugee claimants, she and the child could not leave Canada without abandoning their claims.

**[34]** Given the provision in the custody order allowing removal of E. for up to two weeks, it appears that the child was not "wrongfully removed" from Hungary. However, there can be no doubt that she was wrongfully retained. It was the Applicant's choice to initiate the refugee process here for E.. Any restrictions which flow from that choice do not form a legal impediment to the child's return, as required by the Convention.

**[35]** Pursuant to Article 12, this court is mandated to order a return of E. to Hungary. The Convention sets out several exceptions to an order of return, however, which, if established, would give this court the discretion not to make the order.

## EXCEPTIONS TO A RETURN ORDER

**[36]** The Respondent refers to Articles 13(b) and Article 20 in asking the court not to make a return order. Those provisions are set out below.

> **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 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.

**[37]** The Respondent claims that an order returning E. to Hungary would expose the child to physical and psychological harm in two respects:

1. E. would be separated from her mother, brother, and sister, and cut off from her Roma heritage.
2. E. would be at risk of physical and psychological harm because of the persecution of Roma people in that country and, in particular, because she is the daughter of Respondent, who has been subjected to harassment, violence and threats of violence because of her activism. The facts which support this branch of the 13(b) claim are also relied upon in reference to the Article 20 claim.

**[38]** In addition, the Respondent submits pursuant to Article 13 that E. has stated clearly that she does not want to return to Hungary, and that her wishes should be respected.

**[39]** In her materials before this court, the Respondent further alleged that E. would be at risk of harm if returned to Hungary because of sexual abuse by the Applicant. During the argument of the application, the Respondent withdrew this claim from consideration, conceding that she had not established this risk on the balance of probabilities.

**[40]** Canadian courts have held that in order to preserve the effectiveness of the Convention, the provisions for exceptions to an order of return should be narrowly construed. As Justice Jacques Chamberland observed in *R.F. v. M.G.*, 2002 CanLII 41087 (Que. C.A.):

> "The Hague Convention is a very efficient tool conceived by the international community to dissuade parents from illegally removing their children from one country to another. However, it is also, in my view, a fragile tool and any interpretation short of a rigorous one of the few exceptions inserted in the Convention would compromise its efficacy."

**[41]** Courts have emphasized that Article 13 (b) sets a high standard that must be surmounted if a return order is to be avoided. It is recognized that a return order will often cause a child some distress, and that the upset incidental to any such order cannot automatically meet the required threshold. In *Thomson v. Thomson*, *supra note 3* , the Supreme Court of Canada held that "The physical or psychological harm contemplated by the first clause of Article 13 (b) is harm to a degree that also amounts to an intolerable situation…(*the harm must be*) substantial, and not trivial".

**[42]** In *Jabbaz v. Mouammar*, (2003) O.J. 1616, the Ontario Court of Appeal held that:

> "The circumstances in which a court may refuse to order the return of a child under Article 13 are exceptional. The risk of physical or psychological harm, or, as alleged in this case, an intolerable situation must be, as set out in Article 13, 'grave'. The use of the term 'intolerable' speaks to an extreme situation that is unbearable; a situation too severe to be endured."

**[43]** Courts have made it clear that in assessing what is an "intolerable" situation, that it is important to consider what may be intolerable for "this particular child" who is the subject

of the application in her "particular circumstances"[4].

**[44]** In considering Article 13 (b), it is important to remember the basic presumption of the Convention that all contracting states "are equipped to make, and will make, suitable arrangements for "a child's welfare[5]. That presumption is rebuttable, but the onus is on the party seeking to establish an exception to the Convention.

**[45]** The Respondent has not established that Hungarian courts are not well-equipped to determine the issues of custody of and access to E.. In her initial affidavit, the Respondent stated that she would demonstrate that "the system in Hungary does not properly address the best interests and protect children, particularly Romani children". As set out below, the Respondent has led evidence indicating that right-wing interests and perhaps what she refers to as the "secret police" in Hungary persecute Roma people. However, there is nothing in the evidence that indicates that the Hungarian courts cannot deal properly with E.'s best interests.

**[46]** The record of the current litigation indicates that the Hungarian court is guided by the principle of the best interests of the child. The Respondent has enjoyed "success" in the previous cases (prior to her departure) in Hungarian courts concerning E.[6]. At the time the Respondent left Hungary with the child, the Hungarian court had been receiving evidence from the parties and other witnesses for a period of some months and had just, at her request, appointed a lawyer for the child and ordered a family assessment. I do not infer from the fact that the assessment was not commenced within the month before the Respondent's departure that the Hungarian court system is ill-equipped to determine E.'s custody and access.

**[47]** I consider below the several branches of the Respondent's 13(b) claim.

**Separation from Respondent and siblings**

**[48]** The Respondent's argument that separation from herself, M., and L. would constitute a sufficient basis for a 13 (b) claim must fail.

**[49]** The evidence from Ms. Szende establishes that E. has a great love for both her parents, a bond to her siblings, and positive feelings for each of her parents' new partners.

**[50]** Regardless of what order is made in this case, E. will likely have a diminished relationship with one of her parents and with family and friends in the country in which she is not living. If E. returns to Hungary, she may be able to spend summers and other vacation periods in Canada, although her immigration lawyer has warned that her entry to Canada cannot be guaranteed. If E. is not returned and stays in Canada, then (assuming her acceptance as a refugee), she will not be permitted to visit Hungary, the country from which she "fled", until she is a Canadian citizen, a process that may take up to six years. During

[4] Husid v. Daviau, .2012 ONSC 547, at para. 103; W.F. v. R.J., (2010) EWHC 2909 (Fam.) at para. 31.
[5] Finizio v. Finizio-Scoppio, 1999 CanLII 1722 ONCA
[6] In her statement to the Immigration and Refugee Board, the Respondent indicated that she had been successful in previous cases between herself and the Applicant concerning E..

that time, she will only be able to visit the Applicant at a country outside Hungary. The modest financial circumstances of each of the parties make it unlikely that much money could be devoted to financing transportation and accommodation in a third country for visits. The Applicant's circumstances make it unlikely that he would be financially able to leave his wife and young child in Hungary and pay for lengthy visits in Canada.

**[51]** I do not accept the Respondent's allegation that a return to Hungary will sever E.'s connection to her Roma heritage. Ms. Szende's evidence establishes that the child is mindful of and proud of this heritage. The Applicant, although not of Roma heritage himself, has worked in the area of Roma education for years and has many connections in the Roma community. He is committed to keeping E. in touch with her heritage. E.'s maternal grandmother and aunt, who are Roma, live in Budapest, and E. would have contact with them.

**[52]** It is in the nature of Hague cases and return orders made in those cases that often a child will be separated from significant family members. The courts have found that the distress and possible psychological harm caused to a child by such separations do not place the child in an "intolerable situation" as contemplated by the Convention. For example, in *Thomson v. Thomson*, *supra*, the Supreme Court of Canada upheld a judge who found that the separation of a two-year-old child from his mother, who was his primary caregiver, did not furnish a sufficient basis to make a finding that the child would be a risk of psychological harm because of a return order.

**[53]** The Respondent's counsel had a further submission, that harm to a child's "primary parent" caused by a return order to the requesting country can constitute harm to the child herself. She referred to E.A. v. L.M.,[7], a case in which the Quebec Superior Court refused to return a 5-year-old girl to Mexico. Because of the mother's lesbianism, the Mexican courts had transferred custody to the father, and had convicted the mother of "corruption of a minor". The evidence was that, if a return order was made, the mother would accompany the child; that would mean that the mother would be jailed, and the child removed from the parent who had provided her care for her entire life.

**[54]** The facts in the instant case are different in significant respect from the facts in that case. E. is almost 14 years old, and has spent significant periods of time in the Applicant's care. There is no evidence that the Hungarian courts have in the past employed standards to determine E.'s custody or residential pattern that were not based on the child's best interests. The Respondent does not propose to return to Hungary for any reason, including the issuance of a return order. She does not propose to continue the litigation in Hungary, even if that could be achieved without her physical presence in that country.

**Risk of physical/psychological harm by reason of Roma heritage and parentage**

**[55]** Many 13 (b) claims are advanced on the basis of anticipated harm caused by the "left-behind" parent's violence to child, or to the abducting parent, whose welfare is central to the welfare of the child. That is not the basis for the Respondent's claim[8]. She asserts that

[7] 2010 QCCS 4390

[8] The parties agree that the Applicant assaulted the Respondent on one occasion, approximately 10 years ago,

E. will suffer because of persecution in her country of origin. Courts have acknowledged that "intolerable harm" may emanate from crises – such as a state of war – in the requesting country, which may create a situation of danger for the child, if returned[9].

**[56]** The Applicant argues that Respondent has faced threats and persecution because of her advocacy activities for at least ten years; that she has tolerated and managed this risk; and that her real motive for leaving Hungary (and abducting E. in the process) is economic. She has been unable to find employment which she finds suitable since she lost her seat as a member of the European Parliament.

***Evidence***

**[57]** The Respondent has presented evidence of risk to E. in Hungary by reason of her Roma heritage and her particular parentage—the fact that she is the daughter of V.M. She fears that if E. returns to Hungary, that she will be targeted by those who have threatened her.

**[58]** The evidence establishes that Roma people, including Roma children, are persecuted in Hungary by right-wing groups, and that state protection is not always effective. The persecution extends to threats of violence and actual acts of violence. The evidence refers to three occasions over the past five years in which Roma have been killed in racist attacks.

**[59]** The Respondent has a long history of Roma activism, as a journalist, as a past member of the former Hungarian government dealing with school desegregation and other Roma issues, and as a former member of the European Parliament. She continued this activism in her writing and advocacy for some time after she left office.

**[60]** The Respondent's evidence is that, in her work as a member of the government, a parliamentarian, and an activist, she received threats of harm "daily", threats that sometimes referred to her and her family. She has twice been accosted in the street by women who hate her for her efforts to desegregate schools. For several months in 2009 while she was a member of Parliament, the Respondent requested and received a police guard for herself and her family because of these threats. She had her home in Budapest fitted with special security system.

**[61]** In October 2010, the Respondent withdrew from advocacy activities. She was tired, psychologically stressed, and fearful[10].

**[62]** The Respondent suggests in her statement to the IRB that she became aware of the fact that certain individuals (unnamed) were implicated in the killing of Roma. She says that a former government colleague was questioned by the police in August 2011 in an investigation of the "crime of unauthorized secret information collection". She took this as a sign that she would be "eventually arrested too for knowing the

but Respondent does not reference this assault in her claim.

[9] See discussion of B.C. Court of Appeal in Suarez v. Carraanza, (2008) B.C.J. 1657 at para. 52.

[10] According to Respondent's statement to the Immigration and Refugee Board.

truth". No further detail is given or corroboration provided with respect to these claims.

**[63]** At the outset of this case, the Respondent's counsel advised that the Respondent was fearful of reprisals against her by neo-Nazis in Canada. She requested that:

- The file be sealed;
- The public be excluded from the proceedings; and
- An order identifying this case by initials only.

**[64]** That relief was not opposed, and I made the order requested . Later the Respondent's counsel requested permission to redact certain portions of her client's statement to the IRB that was to be filed in evidence, and that was agreed upon.

**[65]** The Respondent in her evidence attaches her report of a death threat she received by email in August 2011 (She says is unable to access this email account or the CD she made of such emails). The Respondent states that her mother and sister in Hungary have received threats because of their association with her. She speculates that a cousin who was recently killed may have been killed because of his relationship to her.

**[66]** The Respondent says that in the early days of her activism— 8 years ago, before she began receiving threats—that she allowed her children's pictures to be taken by media outlets. She fears that E. may be identified through those pictures.

***Significance of refugee claim***

**[67]** What is the significance of the fact that a refugee claim for E. is pending before the IRB?

**[68]** In *A.M.R.I. v. K.E.R.*, (2011) 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[11]. 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

[11] Kovacs v. Kovacs, (2002) O.J. 3074, (Ont. S.C.)

which a court has decided a Hague application and a related 13(b) claim.[12]

**[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[13]. 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.

**[71]** The Court of Appeal in A.M.R.I. v. K.E.R., warned against the "abuse of the IRB refugee determination process by an abducting parent to gain a tactical advantage in a looming or pending custody battle." With that caution in mind, I have also considered certain features of the refugee hearing process and of the application submitted by the Respondent and E. to the IRB.

- In this court, both of E.'s parents and the OCL have had an opportunity to present evidence concerning the possible risk to her of a return to Hungary. At the IRB, only the Respondent and the Minister can present evidence relevant to the assessment of that risk. E.'s father has no standing at the IRB, receives no notice of hearing, and has no opportunity to participate.
- E.'s statement to the IRB (her Personal Information Form or PIF) contains no independent information about risk to her; it merely references and relies upon the Respondent's PIF statement.
- The Respondent has provided information in her PIF that is incomplete and misleading with respect to E.'s situation in Hungary and the assessment of risk in her situation. In reference to E., the Respondent states only that when she and the Applicant separated, that she "left with my daughter, who we had adopted in 2001. We haven't talked to him since. Our divorce was finalized in 2005."
- The implication is that the Respondent had custody of E.. She does not mention that the parties in fact had joint custody, or that the child had spent much time—sometimes the majority of her time—with the Applicant, or that the parties were in litigation about E.'s residence at the time she left Hungary. All of this information should have been relevant to the assessment of the risk which the child may face in Hungary.
- An IRB "hearing" may be conducted entirely on the basis of an officer's review of documents filed by the claimant (such as was apparently the case with the Szucsik family), and not involve any viva voce argument, examination, or cross-examination.

***Risk to E. of a return to Hungary***

[12] Kovacs v. Kovacs, *supra;* Suarez v. Carranza, *supra;* Toiber v. Toiber, (2006) O.J. 1191 (C.A.)
[13] I note that E. is not permitted to leave Canada and maintain a refugee claim.

**[72]** The fact that conditions in a country may be more unsettled and pose a greater risk to its residents than conditions in Canada is not sufficient in itself to establish a 13 (b) claim. For example, in *J.S. v.R.M.*, 2012 ABPC 184, Justice R. J. O'Gorman rejected a 13 (b) defence raised against an order requested to return a Palestinian child to Israel. The child's father, who lived in Calgary, had argued that that the higher probability of war or of terrorist activity in that country posed a grave risk of harm to the child. Justice O'Gorman cited similar reasoning in *Brill v. Brill*, 2010 ABCA 2229, a mobility case in which the parent resisting a move to Israel had argued that the child would be at risk of harm because of unrest in that country.

**[73]** An argument that a child will be at risk of harm if returned because of conditions in the requesting country requires a nuanced analysis that considers the situation *that* child will be in if returned.

**[74]** The Respondent has made it clear that she will not return to Hungary if this court orders E.'s return, so the question of whether the child would not be safe in Hungary in her mother's care is moot[14].

**[75]** The relevant question is whether E. would be at grave risk of intolerable harm if returned to Hungary, *and* placed in her father's care. The Applicant argues that the evidence falls far short of establishing that risk.

**[76]** The OCL agrees, arguing that "there is no evidence before this court to cause concern that E. would be at risk of danger as contemplated by Article 13 of the Hague Convention if in the care of her father".

**[77]** I agree with the position of the Applicant and the OCL on this issue.

**[78]** I find that the Respondent has failed to establish on the balance of probabilities that E. would be at grave risk of harm if returned to Hungary.

**[79]** I have considered E.'s *actual* experience while living in Hungary (with the Applicant and with the Respondent). I have also considered the Respondent's candid admission that E. would be "safe" if she lived with the Applicant, as well as the Applicant's opinion that he can protect the child from any risk she may encounter. I find that although there is some risk of harm to the child because of her Roma heritage and parentage, that this risk is remote and can be safely managed by the Applicant. I examine the facts relevant to my conclusion in more detail below.

- Up until a year ago, E. lived in Hungary, and came to no harm. Some of the time she lived with the Respondent, and some of the time she lived with the Applicant. She received no threats. She was not attacked. She was not persecuted or harrassed. She did not attend segregated schools. Although at least in recent years the Respondent had the child driven by car to school, when the child was with the Ap-

[14] The Applicant has also submitted that the child would also be safe in her mother's care in that country.

plicant she went to school with her friends on public transit, with no ill effect.

- The Respondent was content to have E. live with the Applicant half, or even most of the time, during extended periods in which, according to her evidence, she was receiving daily threats to herself and her family. The Applicant did not have police protection at his home, or a sophisticated security system. The Respondent was not compelled to have E. spend these extended periods with the Applicant; she chose to do so. Surely she would not have made these choices if she felt that E. was at risk and that the Applicant could not be trusted to protect her.
- Just days after coming to Canada, the Respondent admitted to the Applicant that E. would be safe in Hungary if in the Applicant's care. The Applicant emailed her, saying, "E. is perfectly safe at home, please send her back home." The Respondent replied: "Police officers were protecting our house. The risk affected the whole family at home. Of course, if she would be living with you, it would not be exposed to that kind of risk, you are right in this, but she does not belong to your family. Unfortunately, those are the rules". She offered to allow "regular meetings" for him with E. if he did not "complain".
- The Respondent's husband, Mr. BE., told Ms. Szende that, even though he did not feel that the Applicant had "a right" to E., in his opinion the child would be safe with him. He pointed out that the Applicant's surname, which E. shares, is not a Roma name.
- E. herself did not report to Ms. Szende that she had experienced or was afraid of violence or harassment while she lived in Hungary.

**[80]** I note also, as set out above, that the Respondent has expressed great fear of persecution by neo-Nazis while living here in Canada. Presumably, E. would be subject to that risk if she remains here with the Respondent.

**[81]** If I found that the Respondent's motive in leaving Hungary and removing E. from that country was not fear of persecution but economic, then that would furnish an additional reason to reject her 13 (b) claim[15]. I do not, however, make that finding. It may be that the Respondent's departure was motivated by her inability to find suitable employment in Hungary. The record of the Respondent's statements to the Hungarian court suggests this motive, as does a report in a Hungarian newspaper (Nepszabadsag) from February 2012 (attached as an exhibit to an affidavit of the Respondent)[16]. It may also be that her departure was motivated by fear, because she knew "the truth" about certain Roma killings. Or she may have been motivated by both factors.

[15] For example, see Cannock v. Fleguel,2008 O.J. 4480 (C.A.) a case in which a court rejected a 13(b) claim by a mother resisting a return to Australia because the father there was a violent criminal and drug addict whom she said put the family at risk. The court found that her resistance to return was based not on fear of the father, but on her concern about the effect on her other children, who were not the subject of the application, of a return to that country.

[16] The report notes that the Respondent left Hungary to apply for "political asylum" in Canada, adding that "several sources told the paper that Mohacsi could not find a position and was struggling with financial problems".

**[82]** As for the claim for an exemption under Article 20, the Respondent's arguments and evidence were identical to those offered in support of the 13(b) claim. As noted in a commentary by the late Professor James McLeod quoted in caselaw cited by the Respondent, "the scope of this exception is unclear"…. and "no court has found a valid public policy exception to the Convention"[17].

**Allegation of sexually inappropriate behaviour**

**[83]** In her material filed in response to the Application, the Respondent expressed a concern that E. would be at risk of harm if returned to her father's care in Hungary, alleging sexually inappropriate behaviour. Specifically, she alleged that in the past the Applicant had bathed in the nude with E. and that he slept with the child. She voiced a fear that inappropriate behaviour of some type was continuing. She also alleged that he had hit the child. At the hearing of the application, the Respondent did not proceed with argument on this issue, conceding that the behaviour alleged could not be established on the balance of probabilities.

**[84]** I agree with that view, but wish to review the evidence about these serious allegations, as I am considering the return of the child to Hungary, which would entail a return to the care of the Applicant. In my view, the Respondent's evidence falls far short of establishing that the Applicant physically or sexually abused E..

**[85]** The Respondent, in the most recent litigation in Hungary in 2011, alleged that the Applicant had sexually abused or "behaved inappropriately" with the child. An assessment was ordered in October 2011. She made the same allegations in a criminal complaint to police in September 2011. She left the country in November 2011.

**[86]** The representative of the Central Authority in Hungary advised the OCL that the police investigation was concluded and that there was "no evidence that a crime was committed".

**[87]** The Hungarian court in its decision of December 14, 2012, did not find that the Applicant had engaged in inappropriate behaviour with E..

**[88]** The Hungarian court made negative findings on the Respondent's credibility on this issue. The court found that the Respondent claimed she had first learned of the alleged inappropriate behaviour from Rita Ormos, a former partner of the Applicant. Later in her evidence before that court, the Respondent testified that she had witnessed this inappropriate behaviour when the parties cohabited (a period several years prior to the Applicant's cohabitation with Ms. Ormos).

**[89]** In the statement the Respondent made to Hungarian police in September 2011, the Respondent gave yet another explanation as to how she had learned of the Applicant's alleged inappropriate behaviour with E.; E. had "made a slip of the tongue" a few months before. The Respondent presented an affidavit from Rita Ormos to this court. In her affidavit, Ms. Ormos suggests but does not state that the Applicant slept in the same room as the child,

[17] Cited in J.S. v. R.M., 2012 ABPC 184.

and bathed with her. She does not say that she witnessed this behaviour.

**[90]** Ms. Szende, an experienced clinical investigator, paid careful attention to the allegations of abuse in her interviews with E.. She questioned the child about the issue on several occasions over a four-month period. Ms. Szende deposes that:

> "In my interviews with E. there was no disclosure or confirmation of any sexual impropriety or any physical discipline on the part of Mr. B.. E. was clear in her OCL interviews that her father does not use physical punishment as a form of discipline. She described Mr. B. as kind and loving and not mean."

**Child's wishes**

**[91]** The parties and the OCL agree that E., who is almost 14 years of age, is sufficiently mature that the court ought to take account of her views. Of course, this does not mean that her views are determinative of the case.

***The law***

**[92]** In considering the significance of a mature child's views about a return order, courts have found that it is appropriate to consider a number of factors:

- The strength and consistency of the child's views. Do the views go beyond the "usual ascertainment of the child's wishes in a custody dispute"?[18] A very strong and consistent desire not to be removed is relevant.
- Undue influence on the child's views by a parent.[19]
- The reason for the child's wish not to be returned. Justice Jennifer MacKinnon considered this factor in *Garelli v. Rahma*, (2006) O.J. 1680 (S.C.). She held that the reasons for the child's objections should be "substantial", and observed that in cases in which a child's objection was followed, that the reasons for the objection were "important psychological, language, and educational factors, or were related to parental misconduct by the parent seeking the child's return".

**[93]** Justice MacKinnon also held that an objection based simply on a wish to remain with the abducting parent should not be given effect, particularly if there is evidence that that the abducting parent has influenced the child's views. Justice MacKinnon explained that: "Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention."

***What are E.'s views?***

**[94]** There is no doubt that E. has told the OCL (and others) repeatedly in recent months that she wants to stay in Canada with the Respondent. There is disagreement about whether she is ambivalent about these stated wishes; about whether E. has any fear of returning to

[18] Wilson v. Challis, (1992) O.J. 563 (Ont. Prov. Ct.)

[19] This was a consideration in Toiber v. Toiber, *supra*, a case in which a child l who had previously been happy and done well in a father's care expressed revulsion at having anything to do with him.

Hungary or returning to the care of the Applicant; and about what pressure, if any, either of her parents have placed on her that might affect her thinking. I have evidence from Ms. Szende on these issues. The Respondent says that Ms. Szende has failed to do a thorough and adequate investigation, and that she does not accept that Ms. Szende has accurately presented E.'s views. She deposes that the child has told her how she really feels.

***Evidence of the OCL***

**[95]** Ms. Szende's evidence is the result of seven interviews with the child; interviews with each of the parents, their partners, and with staff from E.'s current school; a review of court documents (orders, reasons for decisions, and some transcripts of evidence) from Hungary; and information received from Dr. Idilko Nemeth of the Ministry of Public Administration and Justice in Hungary, who is a case manager at the Central Authority in that country.

**[96]** Ms. Szende testifies as follows regarding her investigation:

- E. loves both her parents.
- E. is fond of Ms. N. and Mr. BE..
- E. is attached to her siblings M. and L., and longs to meet her new brother, A..
- E. likes Canada, and wants to stay here with her mother.
- E. misses her school and school friends in Hungary, and misses her father and H..
- E. likes Canadian schools, and feels that Canadian society is more accepting of differences than Hungarian society. She has some fear that she may be put back a year if she returns to Hungary, or that her school friends might blame her for leaving without saying goodbye.
- E. would be happy if her whole family (her mother's family and her father's family) could live in Hungary, although she worries that her mother might be in danger in Hungary. She would also be happy if her whole family could live in Canada.
- E. says that she sometimes thinks she wants to go back to Hungary, but that her heart "always goes back to her mother…who tells her which one is better for her".
- In her discussion with Ms. Szende, E. initially thought that very frequent visits to the "left behind parent" would be possible, allowing her, for example, to go back to Hungary every 2-4 weeks to see her father if she stayed in Canada, or to come to Canada just as frequently to see her mother if she returned to Hungary.
- E. came to realize that frequent visits were not a possibility. She then contemplated the possibility of staying in Canada with her mother, and going to Hungary during the summer and other holidays. It was not until late in the interview process, when the OCL received information from the immigration lawyer acting for the Respondent and the children, that E. was advised that Canadian law would not permit her to visit Hungary for a substantial period of time—five to six years–if she was accepted as a refugee claimant[20].

[20] A refugee is not permitted to go to the country in which she has declared she will be at risk while she is a permanent resident. Once she is a citizen, she can travel freely. Immigration counsel estimates that it will be approximately 5-6 years until E. is in a position to attain Canadian citizenship.

- When E. learned of the bar to visiting Hungary posed by Canadian refugee law, she told Ms. Szende that she needed to think further about her situation. After a few days, she told the Society that "Skype would be enough" for her to maintain a relationship with her father, and that she wanted to stay in Canada.
- E. said that her mother told her that she may have to go back to Hungary because she did not "say the right thing".
- E. is under a lot of pressure because of this litigation.

**[97]** Ms. Szende's evidence is that the Respondent has communicated information to E. that may have influenced her expression of wishes.

- The Respondent has told E. that she (E.) would be in danger from neo-Nazis as well as the secret police if she returned.
- The Respondent has told E. about the killing of her cousin Laszlo, which the Respondent speculates was perpetrated by persons in Hungary who hate her because of her activism.
- The Respondent has told E. that her paternal great-grandfather (now deceased) sexually abused a young girl about E.'s age for several years. (The Respondent explains that she told E. this in order to warn her about possible maltreatment by the Applicant if she is returned to Hungary).

**[98]** E. told Ms. Szende that the Respondent was "a little bit angry" with her because E. did not (in a meeting connected with the refugee claim) say clearly enough that she did not want to return to Hungary.

***The Respondent's evidence***

**[99]** The Respondent says that E. has told her repeatedly that she is afraid to go back to Hungary and afraid to live with the Applicant. She says that E. has been "crying daily" about this prospect since she began meeting with the OCL. In support of these allegations, the Respondent has produced excerpts from the child's Facebook account, as well as letters solicited from her teachers.

**[100]** The Facebook excerpts are from conversations between E. and the Applicant. These conversations are in Hungarian. The Respondent has selected and arranged for the translation of certain passages, starting from late June 2012. In these passages, E. urges the Applicant to withdraw his Hague application, saying that she wants to stay in Canada. The Applicant replies, at times doubting that it is she (as opposed to the Respondent) who is writing. He tells E. that he wants to make sure she thinks about this carefully, and tells her—when she talks about coming home every summer—that he fears that the Respondent has misled her, that this will not be possible.

**[101]** Some of the E. 's messages are as follows:

- E. asks the Applicant why he is having police come to take her back to Hungary.

- E. says that she has talked with the Respondent about going back to Hungary in the summers, but that these visits are now not be possible because he "started the case".
- E. says that she is going to "say in court" that she wants to stay in Canada, and that she will not change her mind.
- E. complains that she may "have to change schools" because of the Applicant.
- E. asks the Applicant to visit, and says she misses him. The Applicant explains that he does not have the money to come to Canada at that time.

**[102]** The Respondent states that E. has told her teachers that she wants to stay in Canada with the Respondent and her siblings, and does not want to return to Hungary. She attaches letters from them confirming this.

**[103]** The Respondent also attaches as an exhibit to her affidavit a letter from Mr. Brouwer, the family's immigration lawyer, advising that, if E. leaves Hungary, there may be difficulties in her returning to Canada for a visit. As a person who had made a refugee claim, she may be refused entry because of a fear that she will not voluntarily depart from Canada.

**[104]** The Respondent is of the opinion that when E. told the Guardian's office in Hungary in August 2011 that she did not want to leave Hungary with the Respondent (at that point, a move to Ireland was contemplated) and wished to stay with her father, that the child made these statements because she was told to by the Applicant. The Respondent says that the child has a "low I.Q." and is vulnerable to pressure and suggestion. The Respondent says that the Applicant promised the child a treat—an extended vacation—if she made the statement.

***Conclusion***

**[105]** I am of the view that Ms. Szende's evidence gives me the most accurate information about E.'s perspective on a possible return to Hungary.

**[106]** Ms. Szende is a professional with no personal interest in the case. She is experienced in interviewing children. She was alert to the important issues in this case, such as the allegation of sexual abuse against the Applicant, and the allegation that E. will be at risk because of her Roma heritage and parentage if she returns to Hungary.

**[107]** Ms. Szende's investigation of those issues is more than adequate, keeping in mind the relatively short timeframe (four months) within which she was operating. The OCL was appointed at the request of the Respondent (and over the objection of the Applicant, who was concerned about the delay that OCL involvement would entail). In my view, the Respondent's criticism of Ms. Szende's investigation is the result of her displeasure that some of the views reported from E. do not match what the Respondent wanted to hear.

**[108]** I do not suggest that the Respondent is fabricating her reports of E.'s statements to her. It may be that when E. is with the Respondent, she in fact expresses views different than

those she reported to Ms. Szende, because those are the views that she senses will please her mother.

**[109]** The Respondent has an interest in the outcome of this case, and in my view it skews her perceptions of E.'s views. She clearly feels that E.,as a Roma child, should be with her because she is Roma, and the Applicant is not.

**[110]** I find that E. has said consistently over the past four months that she wants to stay with her mother in Canada. I also find that at the same time, the child has been ambivalent about the loss which either decision will mean for her contact with her family, and that she has considered returning to Hungary. E. is under intense pressure from this litigation, and what she understands to be her place in the litigation.

**[111]** It could be said that both parents have attempted to influence E. in her decision.

**[112]** The Applicant was anxious that E. not be misinformed about the likelihood that, if she remained in Canada, she could visit Hungary and her family there within the next several years. In my view, this was a responsible attempt to insure that the child had necessary information in order to form an opinion of what was in her best interests.

**[113]** In her conversations with Ms. Szende, E. acknowledged the powerful influence that her mother's views have on her. This is not surprising. For a year, E. has been solely in the Respondent 's care, and has had only electronic communication with her father. The Respondent may have, in her discussions with E., felt that she was giving E. information that she needed to responsibly form an opinion of what was in her best interests. However, in my view, she has attempted to mislead and unduly influence the child. I say this for the following reasons:

- Despite her acknowledgement that E. would be safe in the Respondent's care from persecution as a Roma child (and as her daughter), the Respondent has told the child that she will be in danger in Hungary, and given her information (such as the report about Laszlo) calculated to stoke that fear.
- Although the Respondent knew soon after coming to Canada that she and her children would be unable, if successful in their refugee claim, to go to Hungary for many years[21], the Respondent did not give E. this information. Instead, she held out the prospect that, if the child remained in Canada, that she would be able to go to Hungary in the summers.
- E.'s statements in the Facebook exchanges above suggest that she had been given information suggesting that "police" might make her return to Hungary, and that it was the Applicant's fault that she would not be able to visit Hungary in the summer or that she might have to change schools. It is reasonable to think that these suggestions came from the Respondent.
- The Respondent's "warning" to E. that the Applicant's grandfather had been guilty of abusing a child can only be seen as an attempt by her to negatively influence the child's views of her father.

[21] This information is contained in her email to the Applicant of Nov. 28, 2011

**[114]** I also take into account the fact that, before E. was removed from Hungary and while she was spending frequent time with both parents, she expressed a view contrary to what she has expressed in the past four months , preferring to remain in Hungary. I do not accept the Respondent's contention that the child has a "low I.Q.", will blindly do what she is told, and in fact lies, and that she simply parroted what the Applicant told her to say in that statement. The reports from E.'s school and Ms. Szende's evidence do not support this picture of E.. E. appears to be a thoughtful child of at least average intelligence who is developing an independent personality.

**[115]** I accept that at present E., having understood the limitations that remaining in Canada will have on her abililty to see her father and family in Hungary, wishes to remain in Canada. Her wish to stay in Canada is in my view based on her desire—despite ambivalence—to stay with her mother and M. and L.. Her wish is not motivated by any fear of her father, or fear of life in Hungary that is based on her own experiences there.

**[116]** In *J.S. v. R.M., supra*, the court declined to order the return of a 10-year-old Arab/Palestinian boy to Israel, based on his wishes. In his evidence, the child reported in detail as to how his experience of living in Israel made him feel unsafe when going to school, or walking on the street. If E. had suffered similar experiences in Hungary, I might find that experience a basis to consider not making a return order. However, that is not the case. To the extent that E. has fears of persecution in Hungary, those fears result from what she has been told by the Respondent since coming to Canada. It is reasonable to expect that her fears will dissipate if she returns to Hungary, to her former school and classmates and to her home with the Applicant and his wife and child.

**[117]** I respect E.'s efforts to weigh the pros and cons of remaining in Canada versus returning to Hungary. I thank the OCL for attempting to give the information needed to form her views. I cannot, however, permit E.'s preference to determine my decision in this case. As was the case with Justice MacKinnon in *Garelli v. Rahma, supra*, I find that "the principles of deterrence, prompt return of the child, respecting the status quo and entrusting the court of the habitual residence with the best interests determination" outweigh the child's wishes.

**ORDER**

**[118]** I order that E. be returned to Hungary forthwith.

**[119]** If further direction is required, counsel may arrange an attendance or teleconference before me.

**Released: November 30, 2012**

Signed: "Justice E.B. Murray"