Court of Appeal Overturns Return Order Pending Refugee Claim

In ***M.A.A. v D.E.M.E., 2020 ONCA 486***, the Ontario Court of Appeal weighed in on the interplay between a child's rights to asylum and a child's interest in being swiftly returned to their country of residence after being wrongfully removed.

The mother brought the parties' three children (aged 2, 5 and 9 at the time of their arrival and 4, 7 and 11 at the time of appeal) from Kuwait to Ontario without the Father's consent and in contravention of a family court order in Kuwait. The mother and children made refugee claims upon arrival.

The father brought a motion seeking the return of the children to Kuwait[1] under the *Children's Law Reform Act* ("*CLRA*") [2] and recognition of the Kuwait family court order granting him access with the children.

The mother filed a cross-application requesting the Ontario court assume jurisdiction for custody and access under s. 23 of the *CLRA* as it was her position that the children would suffer serious harm if returned to Kuwait.

The Office of the Children's Lawyer ("OCL") was appointed on behalf of the children. The OCL provided a Voice of the Child Report[3] for the oldest boy who described being hit by his father with a belt and hot iron. He said that when his father threatened to hurt him, his mother would "get in his way" to protect him. A child psychologist interviewed the oldest boy and concluded that he was fairly consistent in what he had to say, both about fear of his father abusing him were he to return to Kuwait and his desire to stay in Canada. A clinical investigator with the OCL interviewed the two oldest children. Both children described the incident of violence leading to the separation. All three experts supported the independence of the children's views.

The application judge found that Ontario did not have jurisdiction under s. 23 of the *CLRA* because of her finding that there was no risk of serious harm to the children. She ordered the children returned to Kuwait.[4]

The mother and OCL appealed on two grounds, which can be summarized as follows:

1. The application judge erred by failing to accept the uncontroverted expert and social work evidence that the children face the risk of serious emotional, psychological, and physical harm if returned to Kuwait, and the expert assessment that their evidence was independent of the mother's influence.

2. The application judge erred by failing to adjourn the entire matter until the children's refugee status had been determined.

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[1] Kuwait is not a signatory to the Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can. T.S. 1983 No. 35 (entered into force 1 December 1983) (the "Convention").
[2] R.S.O., 1990, c. C.12.
[3] A Voice of the Child Report presents the views and preferences of the child to represent the child's viewpoint in a family matter.
[4] *Al-Barqawi v. El-Hassan*, 2020 ONSC 1109

The Court of Appeal agreed with the mother and OCL that the application judge erred in failing to explain why she rejected the evidence offered by three separate experts who met with the children at different points in time over a long period and who each independently found that the children's views were there own. The Court of Appeal was satisfied that there was a risk of physical and psychological harm, that the children's views were clear, and that considering the new evidence including that the father had obtained an "obedience order"[5] in Kuwait, the mother could not realistically return. As such, the Court of Appeal ordered that custody and access orders for the children could be made in Ontario.

Particularly worthy of note, the Court of Appeal concluded that the applications judge erred by ordering the return of the children under s. 40 of the *CLRA* before the determination of the refugee claim. Such an order was found to be in breach of the principle of non-refoulement[6], codified in s. 115 of the Canadian Immigration and Refugee Protection Act, S.C. 2001, c. 27, which forbids a country from returning a refugee or an asylum seeker to a country in which they would likely be in danger of persecution.

The Court of Appeal noted that if a child is ordered returned to a place from which asylum is sought, the child's rights to asylum are lost. A person is not permitted to continue a refugee claim once in their home country. Nor is the person entitled to make a second claim should the person return to Canada: *Immigration and Refugee Protection Act*, at ss. 96 and 101(1)(c)).

The Court of Appeal adopted the reasoning of the High Court of Justice of England and Wales in F.E. v. Y.E., [2017] EWHC 2165 (Fam) at para 17:

> …[I]t is impossible for a return order to be made while an asylum claim is pending. Such an order would place this country in direct breach of the principle of non-refoulement. It is impossible to conceive that the framers of the 1980 or 1996 Hague Conventions could have intended that orders of an interim procedural nature could be made thereunder in direct conflict with that key principle.

While the Court of Appeal left to another day how it would proceed if a return order to a signatory country was sought under the *Hague* Convention in the face of a pending refugee claim, it would be surprising if the result were to differ given that the English case was decided under the *Hague Convention*.

Finally, the Court of Appeal rejected the OCL's argument that the serious harm analysis under s. 23 should be adjourned until the refugee determination is made. The OCL argued that in light of the Court of Appeal's decision in *A.M.R.I. v. K.E.R.*, 2011 ONCA 417, holding that a determination of refugee status must be treated by a Hague Convention application judge as giving rise to a rebuttable presumption of a risk of harm within the meaning of art. 13(b), a finding that a child

[5] The obedience order obligated the mother to "enter into submission" to her husband and "obey her husband". The father's statement that he would not enforce the custody order or the obedience order offered little reassurance to the Court of Appeal.
[6] *A.M.R.I. v. K.E.R.*, 2011 ONCA 417, para 74.

was not at risk of serious harm under s. 23 would render unavailable the rebuttable presumption of harm if the child ultimately qualifies as a refugee.

The Court of Appeal did not share the OCL's concern and held *in obiter* that when a request is made for the court to exercise jurisdiction under s. 23 in the face of a pending refugee claim, but the court is not satisfied that the serious harm requirement has been met, the court may want to consider exercising its power under s. 40(2) to stay the proceedings until the refugee claim is determined. However, even when the court concludes that the s. 23 test was not previously met, it will always be required to revisit the s. 23 analysis in light of the refugee determination and through the lens of the rebuttable presumption of harm. Most importantly, the return order under s. 40 could not be made before the refugee claim is resolved.

This case serves as a reminder that a court should not refuse to consider the evidence of an expert without explanation.[7] For Canadian lawyers, the case provides an additional take-away: clients making claims under s. 23 of the CLRA or 13(b) of the *Hague Convention* may also consider making a claim for refugee status, if applicable.

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[7] See also *Segal v. Segal*, 2002 CarswellOnt 2228, 26 R.F.L. (5th) 433 (Ont. C.A.); *Migliore v. Migliore*, 1989 CarswellBC 435, (*sub nom.* Migliore (Zaisek) v. Migliore) 23 R.F.L. (3d) 131 (B.C. S.C.)