

Case Law Update: A.M.R.I. v K.E.R.

June 1, 2011

By Jessica Eisen

2011 ONCA 417 (Released June 2, 2011)

Refugee Hague Convention Procedural Fairness Paramountcy

In this decision, the Ontario Court of Appeal elaborated on its brief reasons, provided April 18, 2011, setting aside an order to return a child to her mother in Mexico pursuant to the *Convention on the Civil Aspects of International Child Abduction* (the "Hague Convention"). The order had been issued even though that child had already been granted refugee status as a result of abuse by her mother. In this decision, the Court provided its reasons on a constitutional paramountcy challenge and held that the child should have benefitted from heightened procedural protections pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms* (the "Charter").

In 2008, a 12-year-old girl who lived with her mother in Cancun, Mexico, came to Toronto to visit her father. While in Toronto, the girl disclosed that she was being abused by her mother. The girl stayed in Toronto under the care of her aunts, and in 2010, she was granted refugee status due to the threat of abuse by her mother. The girl's mother subsequently brought an application under the Hague Convention alleging that the girl was being wrongfully retained in Ontario. The Court of Appeal found fault with a number of the application judge's procedural decisions, the results of which were that the hearing was uncontested by the father, the aunts, or the girl. The application judge granted an order for the girl's immediate return to Mexico.

On appeal, the girl's father argued that s. 46 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("CLRA"), which incorporated the Hague Convention, was rendered inoperative due to a conflict with s. 115 of the federal *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"), which codifies the international law principle that refugees should not be returned to a country where they face certain serious threats (*non-refoulement*). The Court of Appeal found that, although the Hague Convention can require the return of children to their countries of origin without express regard for refugee status, exceptions in the Hague Convention allow for an interpretation that prevents either an operational conflict with s. 115 of the IRPA, or a frustration of its purpose. The Court of Appeal went on to posit that in Hague Convention applications, there is a rebuttable presumption that the return of a refugee child gives rise to a risk of persecution, thus requiring consideration of the Hague Convention exceptions.

The court further established that a child who is a refugee must be accorded procedural protections under s. 7 of the *Charter* in proceedings to return that child to her country of origin pursuant to the Hague Convention. In this context, s. 7 requires that the application judge conduct an assessment of the risks associated with returning the child, and that the child has the right to representation, notice of the application, adequate disclosure of the case for an order of return, a reasonable opportunity to respond and to state her views on the merits, a hearing in cases where credibility is a serious issue, and a right to reasons for the decision.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035

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