

Intersection of Child Abduction Process and Refugee Claim

The Court of Appeal for Ontario has released its decision in *A.M.R.I. v. K.E.R.* (available [here](#)). The decision deals with the intersection of the law relating to children who advance a refugee claim and the law on returning abducted children under the Hague Convention.

A girl of 12 had travelled from Mexico, where she lived with her mother (who had custody), to Ontario to visit her father (who had access rights). There she disclosed that she had been abused by her mother. She made a refugee application and the Immigration and Refugee Board of Canada found her to be a refugee as a result of the abuse. After she had lived in Ontario for about 18 months, the mother applied under the Hague Convention for her return to Mexico. The Superior Court of Justice ordered that she be returned, and she was – in quite a remarkable way which violated her right to dignity and respect (para. 7). On appeal, the Court of Appeal reversed that decision. It set aside the order of return and ordered a new hearing on the Hague Convention application.

One of the key concerns for the court was the child's lack of participation in the Hague Convention application. That application was, in effect, heard *ex parte*, with no submissions in support of the child's remaining in Ontario (para. 31). The court set out some important procedural protections that must be provided to the child (para. 120).

The court also had to grapple with the interplay of the statutes that implemented the Refugee Convention and the Hague Convention. It rejected the argument that the implementation of the latter (provincial law) was unconstitutional by virtue of it violating the implementation of the former (federal law). The court held that the two could be read and applied together without a division of powers conflict (paras. 62-71).

The court held that when a child has been determined to be a refugee, a rebuttable presumption arises that there is a risk of persecution if the child is returned (para. 74) and thus a risk of harm (para. 78). This then must impact the analysis under the Hague Convention.

The application judge had not accorded any weight to the refugee status and accordingly had erred in law. The judge also failed to consider the exceptions in the Hague Convention that allowed the court to refuse to order a child's return.