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Domestic Violence and International Child Abduction at the Border of Canadian Family and Refugee Law

MICHELLE HAYMAN*

Cet article porte sur l'interaction problématique entre la *Convention sur les aspects civils de l'enlèvement international d'enfants* et le droit des réfugiés au Canada, surtout lorsque des allégations de violence conjugale pèsent sur le parent qui se retrouve seul. Il aborde la façon dont les cours de la famille canadiennes, principalement en Ontario, ont traité les demandes de statut de réfugié en cours en parallèle lors de leur prise de décisions relativement à l'application de la Convention de La Haye. Il examine également le traitement du droit relatif à l'enlèvement international d'enfants dans les décisions canadiennes en matière de détermination du statut de réfugié qui comportent des allégations de violence conjugale. L'auteure termine en suggérant des changements juridiques et des changements en matière de politique à apporter pour aider à réduire le fardeau injuste qu'impose l'interaction entre ces régimes juridiques aux membres de la famille qui fuient la violence conjugale.

This article explores the problematic interaction of the *Hague Convention on the Civil Aspects of International Child Abduction* with refugee law in Canada, particularly where domestic violence by the left-behind parent is alleged. It discusses how Canadian family courts, primarily in Ontario, have treated concurrent refugee claims when deciding Hague Convention applications. As well, it explores the operation of international child abduction law in Canadian refugee determinations where domestic violence is alleged. The article concludes by offering suggestions about legal and policy changes which could help reduce the unfair burden the interaction of these legal regimes places on family members fleeing domestic violence.

THIS ARTICLE EXPLORES THE PROBLEMATIC INTERACTION of the *Hague Convention on the Civil Aspects of International Child Abduction*¹ (Hague Convention) with refugee law in Canada and provides suggestions for legal changes to reduce the unfair burden this interaction places on family members fleeing domestic violence. As will be discussed, two major problems arise in the interaction between Hague Convention proceedings and refugee claims in Canada. First, challenges arise in the interpretation and application of the Hague Convention where a taking parent² or their child has initiated a claim for protection as a refugee. Second, a woman who has fled across national boundaries with her child may face allegations of international child abduction

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¹ *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 1343 UNTS 89 [*Hague Convention*].

² This article will use the term "taking parent" to describe a parent who leaves a country of "habitual residence" with their children and "left-behind parent" to describe the other parent.

and thus be excluded from claiming refugee status for having committed “a serious non-political crime” under Article 1F(b) of the *Convention Relating to the Status of Refugees* (Refugee Convention).³

The Hague Convention is a multilateral treaty which aims to protect children “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.”⁴ It has been incorporated into domestic family law legislation in all Canadian jurisdictions.⁵ A left-behind parent may file an application in a Canadian jurisdiction for the return of the child removed to Canada in order to resolve custody and access matters in the place of the child’s habitual residence.⁶ The drafters of the Convention primarily intended to stop parents without custody rights from circumventing the family law process by fleeing the country.⁷ According to the most recent statistics available from 2008, approximately sixty-nine per cent of the taking parents in Hague Convention applications were mothers, and seventy-three per cent were primary or joint primary caregivers.⁸

A large body of academic writing critiques the operation of the Convention in cases of domestic violence, as it may force the return of a child, as well as a taking parent who is unwilling to let their child return alone to a dangerous situation.⁹ Less attention has been given to the dramatic impact that allegations of child abduction may also have on refugee claims made by a parent and child, especially where their asylum claim is based on the abuse perpetrated by the left-behind parent.

Individuals fleeing domestic violence across borders may seek refugee status in the country of arrival. In order to be recognized as a Convention refugee, an applicant must demonstrate a “well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion.”¹⁰ In the Canadian refugee determination system, domestic violence has been recognized, in some circumstances, as amounting to persecution.¹¹

However, as will be discussed further below, a successful Hague Convention application can force the return of a child before the resolution of their refugee claim.¹² Evidence of a Convention application may also exclude the taking parent from making a refugee claim, as child

³ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 1F(b) [*Refugee Convention*].

⁴ *Hague Convention*, *supra* note 1, Preamble.

⁵ Nicholas Bala & Mary Jo Maur, “The Hague Convention on Child Abduction: A Canadian Primer” (2014) 33:3 CFLQ 267 at 269 [Bala & Maur]; *Children’s Law Reform Act*, RSO 1990, c C 12, s 46 [CLRA]

⁶ *Hague Convention*, *supra* note 1, art 12; CLRA, *supra* note 5 at s 46(5).

⁷ Bala & Maur, *supra* note 5 at 270.

⁸ Rona Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Oxford: Hart Publishing, 2013) at 56 [Schuz].

⁹ See e.g. Shani M King, “The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence” (2013) 47 Fam L W 299; Taryn Lindhorst & Jeffrey L Edleson, *Battered Women, Their Children and International Law* (Boston: Northeastern University Press, 2012) [Lindhorst & Edleson]; Carol Bruch, “The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases” (2004) 38 Fam L Q 529.

¹⁰ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 96 [IRPA].

¹¹ *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [Ward]; See also *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa: Immigration and Refugee Board, 1996), online: <irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx > [perma.cc/MW3C-RTWF] [*Gender Guidelines*].

¹² See e.g. *GB v VM*, 2012 ONCJ 745 [*GB v VM*].

abduction is framed as a serious non-political crime.¹³ In an increasingly globalized and mobile world, international parental child abduction is “an area in which immigration law and family law principles will continue to clash.”¹⁴

Part I of this article provides a brief overview of the Hague Convention on Child Abduction and some of the critiques of its operation in situations of domestic violence. Part II discusses the Hague Convention’s operation in the Canadian context at the intersection of family and refugee law. It explores how Canadian family courts, primarily in Ontario, have treated concurrent refugee claims when deciding Hague Convention applications. Part III discusses the operation of international child abduction law in Canadian refugee determinations where domestic violence is alleged. The paper concludes in Part IV by suggesting how to address some of the failures of Canadian refugee and family law where a parent and their child make an asylum claim based on domestic violence.

I. THE HAGUE CONVENTION AND IMPLICATIONS FOR DOMESTIC VIOLENCE

A. THE FRAMEWORK OF THE CONVENTION

It is necessary to understand the framework of the Hague Convention on Child Abduction in order to appreciate its implications for domestic violence and its operation in Canadian family and refugee law. The Convention is one of many international treaties under the Hague Conference on Private International Law.¹⁵ First adopted by the conference in 1980, there were eighty-eight signatory member states as of 2013.¹⁶ All Canadian provinces and territories have legislatively adopted the Convention as part of their provincial family law.¹⁷

Article 1 of the Convention describes the objects of the treaty as: “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 access under the law of one Contracting State are effectively respected in the other Contracting States.”¹⁸ The Convention provides for the creation of “Central Authorities”: government agencies designed to assist with its enforcement.¹⁹

A removal will be wrongful where the left-behind parent has “rights of custody” over the child,²⁰ was exercising those rights at the time the child was removed,²¹ the child is under sixteen,²² and was “habitually resident” in the left-behind country.²³ As Bala and Maur describe, “the central premise is that in most cases only the court in a child’s habitual place of residence has the

¹³ IRPA, *supra* note 10, s 98; *Refugee Convention*, *supra* note 3, art 1F(b); See *e.g. Kovacs v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1473 [Kovacs].

¹⁴ Michael Battista & Kelly D Jordan, *Canadian Family and Immigration Law: Intersections, Developments and Conflicts* (Toronto: Carswell, 2015) at 263.

¹⁵ Bala & Maur, *supra* note 5 at 269.

¹⁶ Schuz, *supra* note 8 at xi.

¹⁷ Bala & Maur, *supra* note 5 at 269.

¹⁸ *Hague Convention*, *supra* note 1, art 1.

¹⁹ Bala & Maur, *supra* note 5 at 270.

²⁰ *Hague Convention*, *supra* note 1, art 3(a).

²¹ *Ibid*, art 3(b).

²² *Ibid*, art 4.

²³ *Ibid*, art 3(a).

jurisdiction to make determinations about the child's best interests."²⁴ A successful application will lead to the return of the child to their place of habitual residence.

B. THE ARTICLE 13(B) EXCEPTION

There are, however, some limited exceptions to returning the child within the Convention. In the context of refugee law and domestic violence, the most significant exception is Article 13(b), which states:

Notwithstanding 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 ...

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.²⁵

The drafters of the Convention intended this exception to be "interpreted in a restrictive fashion" and be limited in use.²⁶

The Supreme Court of Canada has followed this intention and interpreted Article 13(b) narrowly. Justice La Forest in the Supreme Court of Canada's decision in *Thomson v Thomson*, observed that Nourse LJ had expressed the test correctly in holding that, "not only must the risk be a weighty one ... it must [also] be one of substantial, and not trivial, psychological harm."²⁷ The onus is on the taking parent to establish that returning the child would expose the child to grave risk. In Canada, this exception is the subject of the most litigation in Hague Convention applications.²⁸

C. DOMESTIC VIOLENCE AS GRAVE RISK

The grave risk exception is the locus of cases where domestic abuse is alleged, as the taking parent must establish that returning the child would expose the child to physical or psychological harm, or otherwise place them in an "intolerable situation." In Canada, the jurisprudence has recognized that domestic violence against a parent may be considered to create a "grave risk" of harm to the child, even where the violence is not directed at the child.²⁹ As the Ontario Court of Appeal held in *Husid v Daviau*, "from a child-centred perspective, harm is harm ... Article 13(b) is available to resist a child's return when the reason for the child's removal is violence directed primarily at the parent who removed the child."³⁰ This approach accords with social science research, which

²⁴ Bala & Maur, *supra* note 5 at 273.

²⁵ *Hague Convention*, *supra* note 1, art 13(b).

²⁶ Catherine Norris, "Immigration and Abduction: The Relevance of US Immigration Status to Defences Under the Hague Convention on International Child Abduction" (2010) 98:1 Cal L Rev 159.

²⁷ *Thomson v Thomson*, [1994] 3 SCR 551 at 597.

²⁸ Bala & Maur, *supra* note 5 at 290.

²⁹ *Pollastro v Pollastro*, [1999] OJ No 911 [ON CA].

³⁰ *Husid v Daviau*, 2012 ONCA 655 at para 22.

demonstrates that witnessing domestic violence has a negative effect on the mental health and well-being of children.³¹

However, courts have insisted on maintaining a high threshold for meeting the Article 13(b) exception, in order to preserve the objectives of the Hague Convention. For instance, in *Ellis v Wentzell-Ellis*, the Ontario Court of Appeal held that the application judge set the bar for an “intolerable situation” too low because there was only one incident of physical violence towards the mother.³² Rather than lowering the threshold, Canadian courts have sometimes responded by adding “undertakings” to return orders, such as limited communication orders, which may not be enforceable once the parent and child have returned to the other country.³³

Taking parents are likely to have a particularly difficult time establishing the grave risk exception where an abusive relationship is not necessarily characterized by violence. As Evan Stark has demonstrated, physical violence is not necessarily present in all situations of domestic abuse.³⁴ Abusive relationships may be more accurately categorized through the element of “coercive control,” which Stark describes as “an *ongoing* strategy of intimidation, isolation, and control that extends to all areas of a woman’s life including sexuality; material necessities; relations with family, children, and friends; and work.”³⁵ While Canadian courts have recognized the negative effects on children of witnessing physical violence, there is little recognition of how coercive control could rise to the level of a grave risk of psychological harm in particular. In these situations, the Hague Convention may become another tool of control for an abuser, as it can force the return of their child and former partner.

It is difficult to know how many international parental child-abduction cases involve parents fleeing abuse globally. According to the Central Authority of the Hague, one study concluded that “some form of family violence was found to be present in as many of fifty-four per cent of the relationships in which parental child abduction occurred” and “30% of the left behind parents admitted to engaging in or having been accused of acts of family violence.”³⁶ And yet, globally, the grave risk defence is only successful in approximately twenty-five per cent of cases where the taking parent alleged there was domestic violence.³⁷ As Lindhorst and Edleson argue, “[u]nder the current policies and procedures emanating from the Hague Convention, the treaty indicates that women should stay with their children in the country where they are living, even in

³¹ See e.g. Howard Meltzer et al, “The Mental Health of Children who Witness Domestic Violence” (2009) 14:4 *Child & Family Social Work* 491; Stephanie Holt et al, “The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature” (2008) 32:8 *Child Abuse & Neglect* 797.

³² *Ellis v Wentzell-Ellis*, 2010 ONCA 347 at para 44 [*Ellis*]; For further discussion, see Linda C Neilson, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, family, child protection): A Family Law, Domestic Violence Perspective* (Department of Justice, 2013) at 90-96, online: <justice.gc.ca/eng/rp-pr/fl-lf/famil/enhan-renfo/neilson_web.pdf> [perma.cc/4W9S-BTWU].

³³ See e.g. *JP v TNP*, 2016 ABQB 613 at para 57; *Finizio v Scoppio-Finizio*, 46 OR (3d) 226 at para 44 (CA).

³⁴ Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford: Oxford University Press, 2007) [Stark, *Coercive Control*].

³⁵ Evan Stark, “Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control” (1995) 58:4 *Alb L Rev* 973 at 986.

³⁶ Permanent Bureau, “Domestic and Family Violence and the Article 13 ‘Grave Risk’ Exception in the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper*,” Hague Conference on Private International Law (May 2011) online: <assets.hcch.net/upload/wop/abduct2011pd09e.pdf> [perma.cc/23H8-UQ9X] [Permanent Bureau, “Reflection Paper”].

³⁷ Schuz, *supra* note 8 at 282.

the face of serious abuse.”³⁸ There is significant concern that the provisions intended to protect children may exacerbate their vulnerabilities by sending them back to violent homes.³⁹

The relationship between Article 13(b) and domestic violence is made even more complex by the interaction of refugee claims and the Hague Convention. Where a mother and child have made a successful refugee claim, she will more easily meet the threshold for the Article 13(b) exception. However, as will be seen, where a refugee claim is in progress, no similar safeguards exist. The next section of the article explores the impact of refugee claims, particularly based on domestic violence, in the determination of Hague Convention applications in Ontario.

II. THE IMPACT OF REFUGEE DETERMINATIONS IN HAGUE CONVENTION APPLICATIONS IN ONTARIO

A. *AMRI v KER*: ARTICLE 13(b) WHERE A REFUGEE CLAIM HAS BEEN SUCCESSFUL

In 2011, the issue of how refugee status operates in Hague Convention applications in Ontario received broad public attention when a Hague Convention case reached the Ontario Court of Appeal.⁴⁰ *AMRI v KER* involved a young girl from Mexico who had successfully made a refugee claim based on the risk of harm she faced from her abusive mother.⁴¹ She came to Canada independently of her father and remained there after he left for Norway when his own refugee claim failed. After the girl had been living in Toronto for approximately eighteen months with her aunts, her mother made a Hague Convention application for her return to Mexico. Without hearing from the child, her father, or her aunts, the application judge found she was wrongfully detained in Ontario and granted an order for her immediate return to her mother in Mexico.⁴² Following the order, immigration officers pulled her out of school and deported her to Mexico.⁴³ A few months later however, the girl was able, with the assistance of her aunt, to return to Canada.⁴⁴

Meanwhile her father appealed the decision, providing the Court of Appeal with an opportunity to discuss the relationship between the Hague Convention, codified in section 46 of the Ontario *Children’s Law Reform Act (CLRA)*,⁴⁵ and the *Immigration and Refugee Protection Act (IRPA)*. The father argued that section 46 of the *CLRA* conflicted with section 115 of the *IRPA* and was thus invalid due to the principle of federal paramountcy. Section 115 codifies the principle of “*non-refoulement*,” which protects persons from being returned to a country where they face a risk of persecution.⁴⁶ The Court held that there was no conflict for two reasons. First, the term

³⁸ Lindhorst & Edleson, *supra* note 9 at 2.

³⁹ See Permanent Bureau, “Reflection Paper,” *supra* note 36 at 4.

⁴⁰ See e.g. Nicholas Keung, “Court Orders Ottawa to Return Mexican Refugee” *Toronto Star* (18 April 2011) online: <thestar.com/news/investigations/2011/04/18/court_orders_ottawa_to_return_mexican_refugee.html> [perma.cc/X72C-CAUS].

⁴¹ *AMRI v KER*, 2011 ONCA 417 [*AMRI*].

⁴² *Ibid* at paras 3-7.

⁴³ This incident raises the issue of what role Canada Border Services (CBSA) was playing in the enforcement of the Hague Convention, illustrating the entangled nature between immigration law and enforcement of the Convention.

⁴⁴ CBC News, “Deported Teen Refugee Back in Toronto” (5 May 2011), online: <cbc.ca/news/canada/toronto/deported-teen-refugee-back-in-toronto-1.1038454> [perma.cc/HYJ7-64UW].

⁴⁵ *CLRA*, *supra* note 5 at s 46.

⁴⁶ *IRPA*, *supra* note 10, s 115; *Refugee Convention*, *supra* note 3.

“removal” in section 115 only referred to removal processes under the *IRPA*,⁴⁷ and second, Articles 13(b) and 20 of the Hague Convention “must be construed in a manner that takes account of the principle of *non-refoulement*.”⁴⁸ Article 20 provides that “[t]he return of the child ... 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.”⁴⁹

The Court further articulated the role of section 7 of the *Charter*⁵⁰ in Hague Convention applications where refugee status is at stake. The Court held that “by virtue of her status as a Convention refugee, the child’s s. 7 Charter rights to life, liberty and security of the person were engaged on the Hague application.”⁵¹ It held that children with refugee status facing involuntary removal had rights to a fair process, including meaningful procedural protections (notice, disclosure, an opportunity to respond and to have “his or her views ... considered in accordance with the child’s age and level of maturity,” and the right to representation), and that “a risk assessment be performed regarding the existence and extent of any persisting risk of persecution to be faced by the child on return from Canada to another country.”⁵²

The Court of Appeal held that where a child has refugee status, there is “a rebuttable presumption of risk of harm within Article 13(b).”⁵³ The Court expanded on this to state that a child does not have the burden of establishing that the conditions of risk continue to exist if they have refugee status.⁵⁴ Where a left-behind parent attempts to rebut this presumption, an application judge must “assess the existence and extent of any persisting risk of persecution to be faced by the child.”⁵⁵

In developing this rebuttable presumption, the Court rejected an argument by the Canadian Council of Refugees (CCR), as interveners, that the Minister of Citizenship and Immigration should be required to bring an application to vacate or rescind a child’s refugee status, before the child could be removed to their “habitual residence” by virtue of a Hague Convention application.⁵⁶ The CCR argued that this requirement would ensure that the *non-refoulement* concerns were given full consideration before a child was removed. The Court rejected this argument on two grounds. First, it found that Hague Convention proceedings may meet the “obligation of *non-refoulement* by fairly examining the question of whether the risk of persecution persists,” and second, that resorting to *IRPA* could interfere with the summary nature of Hague proceedings, particularly as there is no mechanism for an aggrieved parent to apply for a child’s refugee status to be vacated.⁵⁷ The Court makes clear that the “risk of ‘persecution’ in the immigration context clearly implicates the type of harm contemplated by art. 13(b) of the Hague Convention.”⁵⁸

⁴⁷ *AMRI*, *supra* note 41 at para 63.

⁴⁸ *Ibid* at para 68.

⁴⁹ *Hague Convention*, *supra* note 1, 20.

⁵⁰ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982, c 11.

⁵¹ *AMRI*, *supra* note 41 at para 97.

⁵² *Ibid* at paras 99, 120.

⁵³ *Ibid* at para 78.

⁵⁴ *Ibid*.

⁵⁵ *Ibid* at para 94.

⁵⁶ *Ibid* at para 84-5.

⁵⁷ *Ibid* at paras 85-86.

⁵⁸ *Ibid* at para 74.

However, in so holding, the Court blurred the distinctions between a risk determination in the context of Hague Convention proceedings and in the refugee context. For instance, refugee decision-makers must look to the availability of internal flight alternatives and state protection, whereas a judge presiding over a Hague Convention hearing presumes that a contracting state will make arrangements for the child's welfare.⁵⁹ Further, a Hague proceeding is an adversarial process, where the left-behind parent may submit counter-evidence to attempt to establish there is no risk to the child, as opposed to the typically inquisitorial nature of a refugee hearing where only the claimant and sometimes the Minister may make submissions.⁶⁰ Finally, the summary nature of Hague Convention proceedings may make it difficult for a Court to satisfy the requirement that "due weight [be given] to the obligation of *non-refoulement*" by "fairly examining the question of whether the risk of persecution persists," within the limited time frame and stricter evidentiary rules than those which obtain in a refugee hearing.⁶¹

Since *AMRI*, the Court has blocked a Hague Convention application on the basis that this presumption has not been rebutted on at least one occasion. In *Borisovs v Kubiles*, the Ontario Court of Justice found that the child and mother's successful refugee claim from Latvia created a rebuttable presumption of grave risk.⁶² The father's application for the child's return was rejected on the basis that he failed to rebut this presumption. In this case, the Court stated that the father provided very little evidence of a lack of risk, relying mostly on "his denials, together with positive reports from his new wife and mother..."⁶³ As such, it remains unclear how much evidence will be sufficient to rebut the presumption. For instance, where both the mother and child's refugee claims were based on domestic abuse targeted at the mother, is it possible that a left-behind father could establish a lack of risk to the child if the child was returned alone, such as the situation in *GB v VM* discussed below?

B. ONGOING REFUGEE CLAIMS IN HAGUE APPLICATIONS

Canadian courts are more reluctant to give much weight to ongoing refugee claims in Hague Convention applications when determining whether the child faces a grave risk upon return. For instance, in *GB v VM*, the Ontario Court of Justice narrowly interpreted the grave risk exception in a situation concerning a mother and child claiming refugee status.⁶⁴ In this case, the mother, a well-known activist and former Hungarian Member of Parliament, had claimed refugee status along with her child and second husband based on fear of persecution as Roma. The father of her child brought an application for the return of the child under the Hague Convention. The case did not involve a claim of domestic violence against the ex-husband, but speaks to the relationship between ongoing refugee claims and Hague Convention applications.

The mother claimed that the child would face a grave risk if she were returned to Hungary. The Court noted that since the Mother refused to return with the child (who was fourteen years old), "[t]he relevant question" was whether she "would be at grave risk of intolerable harm if

⁵⁹ See *Medhurst v Markle*, 1995 CanLII 9273 at para 8.

⁶⁰ See Immigration and Refugee Board of Canada, "Guidelines issued by the Chairperson pursuant to paragraph 159(1)(h) of the Immigration and Refugee Protection Act" (19 January 2016) online: <irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuidDir/Pages/GuideDir07.aspx> [perma.cc/W9K2-HMZD].

⁶¹ *AMRI*, *supra* note 41 at para 85 citing Nmeth at para 52; see also *IRPA*, *supra* note 10, s 170.

⁶² *Borisovs v Kubiles*, 2013 ONCJ 85.

⁶³ *Ibid* at para 45.

⁶⁴ *GB v VM*, *supra* note 12.

returned to Hungary, *and* placed in her father’s care.”⁶⁵ The Court found that “although there is some of risk of harm to the child because of her Roma heritage and parentage, [it] is remote and can be safely managed by the [father].”⁶⁶ It further emphasized that general country conditions do not go to grave risk, stating that “[t]he 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.”⁶⁷ In this particular case, there was also evidence about the child’s lack of fear of returning to Hungary, as reported by the Office of the Children’s Lawyer.⁶⁸

The Court considered the significance of the underlying refugee claim in this case. Justice Murray held that “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.”⁶⁹ In deciding not to delay the Hague Proceedings for the resolution of the refugee claim in this case, she considered certain features of the Immigration and Refugee Board of Canada (IRB) process, including that the child’s father would have no standing to present evidence at the IRB and that an IRB hearing might not involve *viva voce* argument, examination, or cross-examination.⁷⁰ Murray J seemed particularly concerned that the mother implied that she had sole custody of the child in her refugee application documents.⁷¹ Echoing other jurisprudence, the court also expressed concern about the risk of “abuse of the IRB refugee determination process by an abducting parent to gain a tactical advantage in a looming or pending custody battle.”⁷²

The refusal to delay application hearings for the determination of a refugee claim is in line with the Convention’s goal of dealing with matters expeditiously,⁷³ but it also may create insurmountable evidentiary burdens for victims of domestic violence to establish the grave risk exception. The refugee determination process, although not without its own procedural challenges, has more flexible rules of evidence than the judicial system. For instance, it cannot reject evidence simply because it is hearsay.⁷⁴ Further, where the refugee claim between mother and child is joined, the decision-maker will consider the risk of persecution to both parties, whereas Hague Convention proceedings must focus solely on whether there is grave risk to the child. Although our courts recognize that domestic violence may lead to a grave risk to the child, the focus of the analysis in the context of Hague Convention proceedings must remain solely on the child. A positive refugee determination may be the most significant way for a mother to establish the risk of domestic violence to her child in a Hague Convention application dispute. A child returned under a Hague Convention application before their refugee hearing may never have the opportunity to establish their claim.

⁶⁵ *Ibid* at para 75 [emphasis in original].

⁶⁶ *Ibid* at para 79.

⁶⁷ *GB v VM*, *supra* note 12 at para 72; see also *JS v RM*, 2012 ABPC 184 (the court rejected an art 13(b) defence for an application to return a Palestinian child to Israel).

⁶⁸ *Ibid* at para 79.

⁶⁹ *Ibid* at para 69.

⁷⁰ *Ibid* at para 71.

⁷¹ *Ibid*.

⁷² *Ibid*, citing *AMRI*, *supra* note 41 at para 73.

⁷³ See *Toiber v Toiber*, [2006]208 OAC 391 (CA); *Solem v Solem*, 2013 ONSC 1097; *GB v VM*, *supra* note 12 at para 69.

⁷⁴ See *IRPA*, *supra* note 10, s 170; Immigration and Refugee Board of Canada, “Assessment of Credibility in Claims for Refugee Protection” (31 January 2004) online: <irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/Credib.aspx> [perma.cc/P2C6-FBMA].

Further, the Court's current approach fails to recognize the opposite concern: the potential for abuse of the Hague Convention process by a parent looking to frustrate the refugee claim of their fleeing spouse and children. As will be seen below, refugee claimants face significant barriers when child abduction is alleged.

III. INTERNATIONAL CHILD ABDUCTION IN REFUGEE CLAIMS

This section examines the interaction of the Hague Convention with cases of domestic violence in refugee law. As relatively few refugee determination decisions are published, it is difficult to know how often the issue of international child abduction arises. However, as will be explored, the Ministerial Intervention Guidelines (ENF24-Ministerial Interventions) highlight international child abduction as cause for exclusion.⁷⁵ Further, there is a small body of case law from the Refugee Protection Division (RPD), the Refugee Appeal Division (RAD), and the Federal Court (FC), which indicates that international child abduction may act as a double-edged sword for domestic violence claimants.

A. REFUGEE CLAIMS GROUNDED IN DOMESTIC VIOLENCE

Gender is not a recognized ground of persecution in the United Nations' Refugee Convention's definition of a refugee.⁷⁶ However, the IRB's guidelines on *Women Refugee Claimants Fearing Gender Related-Persecution*⁷⁷ recognize "that domestic violence perpetrated by non-state actors can amount to persecution and form the basis for a refugee claim."⁷⁸ The Supreme Court of Canada in *Ward* confirmed that "particular social group" within the definition of a "Convention refugee" could include gender.⁷⁹ Domestic violence may therefore be recognized as a ground for a refugee claim where the state is unable or unwilling to intervene to protect the claimant.

There are, of course, significant challenges for women seeking to establish a successful refugee claim on the basis of domestic violence. In her review of 645 refugee decisions under the pre-2012 system, Efrat Arbel found that decision-makers often set a low bar for meaningful state protection in these cases. As she states, "many adjudicators identified the existence of anti-domestic violence legislation, women's shelters, or other protective services as sufficient to show the availability of state protection, with few referring to documentary material on the adequacy or accessibility of these measures."⁸⁰ Arbel has further criticized the framework of decision-making for gender-based claims, which tends to "portray domestic violence as the product of a foreign culture."⁸¹ Following her arguments, women whose stories do not fit into the tropes of so-called

⁷⁵ Immigration, Refugees and Citizenship Canada, "ENF 24: Ministerial Interventions" (18 March 2016), online: <cic.gc.ca/english/resources/manuals/enf/enf24-eng.pdf> [perma.cc/Q3GL-S5EB] [*Ministerial Interventions*].

⁷⁶ *Refugee Convention*, *supra* note 3.

⁷⁷ *Gender Guidelines*, *supra* note 11.

⁷⁸ Efrat Arbel, "The Culture of Rights Protection in Canadian Refugee Law: Examining Domestic Violence Cases" (2013) 58:3 McGill LJ 729 at 731 [Arbel, "The Culture of Rights Protection"].

⁷⁹ *Ward*, *supra* note 11.

⁸⁰ Arbel, "The Culture of Rights Protection," *supra* note 78 at 756.

⁸¹ *Ibid* at 761.

“barbaric cultural practices,”⁸² such as escaping violence related to polygamy, female genital mutilation, or oppression under religious law, may face barriers establishing their claims. Women may also have difficulties documenting patterns of “coercive control” which do not fit into the model of domestic violence as physical abuse for refugee decision-makers. Further, women who have experienced domestic violence may struggle to develop a relationship of trust with their counsel that allows them to discuss the traumatic experiences that ground their claim within the RPD’s short timelines.⁸³

B. ARTICLE 1F(B) AND INTERNATIONAL CHILD ABDUCTION

Exclusion based on international child abduction is another significant barrier that women claiming refugee status based on domestic violence may face.⁸⁴ Article 1F(b) of the Refugee Convention states, “the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that ... he has committed a serious non-political crime outside of the country of refuge prior to his admission to that country as a refugee.”⁸⁵ Section 98 of the *IRPA* states that, “[a] person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.”⁸⁶ Therefore, an individual will be excluded from establishing they are a Convention Refugee or a person in need of protection if there are serious reasons to believe they have committed “a serious non-political crime.” Article 1F(b) does not require a conviction or even a charge in order to establish there are “serious reasons to believe” the claimant has committed a crime.

The Supreme Court of Canada considered the proper interpretation of Article 1F(b) in *Febles v Canada*.⁸⁷ It rejected the argument that the exclusion was only meant to apply to fugitives from justice and should be narrowly interpreted. Instead, the majority held that,

Article 1F(b) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation.⁸⁸

In assessing the seriousness of a crime, the Court stated that, “where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime

⁸² This language comes from a 2015 piece of legislation amending *IRPA* and other laws titled the *Zero Tolerance for Barbaric Cultural Practices Act* (SC 2015, c 29).

⁸³ See e.g. *YZ and the Canadian Association of Refugee Lawyers v Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, 2015 FC 892 at paras 59, 65-66.

⁸⁴ The publicly available decisions regarding exclusion based on international child abduction almost all concern mothers, but see *Zagroudnitski v Canada (Citizenship and Immigration)*, 2015 FC 582.

⁸⁵ *Refugee Convention*, *supra* note 3, art 1F(b).

⁸⁶ *IRPA*, *supra* note 10, s 98.

⁸⁷ *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 6.

⁸⁸ *Ibid* at para 60.

will generally be considered serious.”⁸⁹ However, the Court was clear that “this generalization should not be understood as a rigid presumption that is impossible to rebut.”⁹⁰ As the Court states,

[w]here a provision of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range ... a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded. ... While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, *the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.*⁹¹

Further, following *Jayasekara v Canada*, when Article 1F(b) is raised as an issue, the Board should analyze the seriousness of the crime through considering the “elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction.”⁹²

Whether international parental child abduction constitutes a “serious non-political crime” remains a contested issue. The IRB takes the position that “[i]nternational kidnapping of a child constitutes a serious non-political crime”⁹³ and does not differentiate between parental primary caregiver cases and other abductions. While a Hague Convention application is not necessary to establish reasonable grounds to believe the taking parent abducted the child, it will be taken as proof of it.⁹⁴ The parent does not need to have been charged with child abduction in order to make this finding. The RAD has held the RPD’s failure to address exclusion once the Minister has raised it in cases of child abduction is an error of law.⁹⁵

Indeed, ENF24-Ministerial Interventions highlight “the abduction or removal of a child from custody in contravention of a custody order” as an issue to which officers should be particularly alert.⁹⁶ Sections 280-286 of the *Criminal Code* govern the abduction of children.⁹⁷ ENF24-Ministerial Interventions list several factors for officers to consider in determining whether a taking parent meets this offence under the *Code*. These include considering “the marital status of the parents,” “consent by the parent or guardian,” and “a custody order in favour of the parent.”⁹⁸

However, the Federal Court has recently addressed the classification of parental child abduction as a serious, non-political crime in *AB, CD & EF v Canada*.⁹⁹ In *AB*, Madam Justice Strickland considered the RPD’s finding that the applicants were excluded pursuant to Article 1F(b) for the serious non-political crime of child abduction and, alternatively, that the applicants

⁸⁹ *Ibid* at para 62.

⁹⁰ *Ibid*.

⁹¹ *Ibid* [emphasis added].

⁹² *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 at para 44.

⁹³ Immigration and Refugee Board of Canada, “Chapter 11- Article 1F” (23 November 2015), online: < irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef11.aspx> [perma.cc/TBP9-B9WD]IRB [IRB, “Article 1F”].

⁹⁴ See e.g. *Kovacs*, *supra* note 13.

⁹⁵ *X (Re)*, 2015 CanLII 80981 (CA IRB).

⁹⁶ *Ministerial Interventions*, *supra* note 75 at 24.

⁹⁷ *Criminal Code*, RSC 1985, c C-46, ss 280–86 [*Criminal Code*].

⁹⁸ *Ministerial Interventions*, *supra* note 75 at 24.

⁹⁹ *AB, CD & EF v Canada (Citizenship and Immigration)*, 2016 FC 1385 [*AB*].

were not Convention refugees or persons in need of protection, as they had failed to establish subjective fear or rebut the presumption of state protection.

Although Strickland J ultimately dismissed the application, she found that the Member's analysis on exclusion was unreasonable. The maximum penalty for child abduction in Canada is ten years. However, as discussed by the Court in *R v Thrones*, "appellate courts, while deploring crimes involving abduction of children, do not impose anything even close to the maximum penalties prescribed in the *Code*. In parental abduction cases, for example, where the maximum penalty by indictment is *ten* years, sentence[s] rarely come anywhere close."¹⁰⁰ In light of the sentencing range in child abduction cases, Strickland J held that the Member erred by failing to consider whether the ten-year rule from *Febles* had been rebutted in this case.¹⁰¹

Further, the Court held that the Member erred in failing to apply the *Jayasekara* factors. It rejected the Member's interpretation of *Jayasekara* and held that "the existence of an international convention, such as the Hague Convention" is not "the sole factor or 'standard' against which seriousness must be assessed."¹⁰²

AB therefore strongly indicates that a member cannot simply assume that child abduction constitutes a serious non-political crime, but instead must apply *Febles* and the *Jayasekara* factors. This is further strengthened by other recent Federal Court jurisprudence that has held that the Member "cannot just designate crimes as 'serious' under Canadian criminal law on the basis of its own opinion."¹⁰³ Despite these decisions, however, ENF24-Ministerial Interventions and IRB policies continue to define child abduction as a "serious crime," without contextual analysis.¹⁰⁴

Of further note, in *AB*, the Applicants argued that Article 1F(b) was not applicable because "no crime had been committed outside Canada as the Applicant was permitted, by the custody order then in place, to remove her daughter from Hungary for two weeks without the prior consent of her ex-husband. Thus, any crime of abduction occurred only two weeks after the Applicant arrived in Canada, and not in Hungary."¹⁰⁵ The applicants sought to certify the question, "Does Article 1F(b) of the 1951 Convention relating to the Status of Refugees apply if the *actus reus* of the crime occurs after entry to Canada as a refugee claimant, if the *mens rea* existed prior to entry?"¹⁰⁶ The Court declined to address this issue or certify the question. The Court in *Puerto Rodriguez v Canada (Citizenship and Immigration)*, discussed further below, also declined to address this same issue.¹⁰⁷ As a taking custodial parent may only be committing a crime when they remain in the country of refuge with the child, it seems that applicants facing exclusion on the basis of child abduction will continue to raise this issue until the Federal Court addresses it.

C. THE SECTION 285 DEFENCE TO CHILD ABDUCTION

ENF24-Ministerial Interventions inform officers to be alert to credible defences under section 285 of the *Criminal Code*,¹⁰⁸ "namely that the acts were necessary to protect the child from imminent

¹⁰⁰ *R v Thrones*, 2009 ONCJ 469 at para 32, cited in *AB*, *supra* note 99 at para 44 [emphasis in original].

¹⁰¹ *AB*, *supra* note 99 at para 72.

¹⁰² *Ibid* at para 81.

¹⁰³ *Hersy v Canada (Citizenship and Immigration)*, 2016 FC 190 at para 68.

¹⁰⁴ *Ministerial Interventions*, *supra* note 75 at 74; IRB, "Article 1F," *supra* note 93.

¹⁰⁵ *AB*, *supra* note 99 at para 22.

¹⁰⁶ *Ibid* at para 152.

¹⁰⁷ *Puerto Rodriguez v Canada (Citizenship and Immigration)*, 2015 FC 1360 at para 8 [*Puerto Rodriguez*].

¹⁰⁸ *Criminal Code*, *supra* note 97, 285.

danger or to allow the parent to flee imminent danger.”¹⁰⁹ The Supreme Court has not yet articulated the precise ambit of this defense, but briefly discussed it in the recent case of *MM v United States*.¹¹⁰ The majority in the decision interpreted the defence strictly and held that, “[it] is available only if the ‘taking, enticing away, concealing, detaining, receiving or harbouring of any young person’ was necessary either to protect the young person from danger of ‘imminent harm’ or if the person charged was escaping from the danger of ‘imminent harm.’”¹¹¹

When domestic violence will rise to the point of imminent harm required by the *Criminal Code* is unclear. There is no mention in the ENF24-Ministerial Interventions of the potential role of domestic violence or contextualization of how ongoing spousal or child abuse may constitute “imminent harm.” Further, the only two cases cited in the ENF24-Ministerial Interventions involved parents who were excluded from making a refugee claim due to international child abduction.¹¹² There are no examples of a successful defence for officers. There is no doubt that international child abduction is a serious crime. However, officers should be more alert to the role that domestic violence may play in a parent’s decision to take their child to another country, particularly in the context of refugee law.

One of the cases cited in ENF24-Ministerial Interventions clearly illustrates the Board’s problematic treatment of international child abduction and the section 285 defence in refugee cases. *Kovacs v Canada* concerned a mother and two children who claimed refugee status from Hungary on the grounds that they faced persecution as Roma and ongoing abuse by her ex-husband.¹¹³ Prior to the RPD hearing, the father brought a Hague Convention application for the return of his son. The Ontario Superior Court of Justice denied the father’s application on the grave risk exception, in large part because the father was a wanted fugitive in Hungary.¹¹⁴ Despite it being denied, this application alerted the RPD to exclude the mother under Article 1F(b) for child abduction.

The Federal Court held that the Ontario Superior Court’s decision was not binding on the Board and upheld the RPD’s decision to find the mother was excluded. It rejected the mother’s argument that the Board should have considered the Superior Court’s decision that her son would be at “grave risk” if returned to Hungary in determining whether she met the “imminent harm” defence under section 285. The Federal Court rejected this argument, stating, “[i]n the Board’s view, the section 285 defence was not applicable because the Board did not believe that the principal applicant or the children had been the victims of abuse by the husband.”¹¹⁵ The Federal Court of Appeal took a similar approach in *Minister of Citizenship and Immigration v Arias Garcia*, where it found a Quebec judgment refusing the return of a child under the grave risk exception to the Hague Convention did not have the effect of preventing a removal order under the *IRPA*.¹¹⁶

¹⁰⁹ *Ministerial Interventions*, *supra* note 75 at 24.

¹¹⁰ *MM v United States*, 2015 SCC 62.

¹¹¹ *Ibid* at para 135.

¹¹² *Ministerial Interventions*, *supra* note 75 at 74; *Paris Montoya v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1674 [*Paris Montoya*]; *Kovacs*, *supra* note 13.

¹¹³ *Kovacs*, *supra* note 13.

¹¹⁴ *Kovacs v Kovacs*, 59 OR (3d) 671 (SC).

¹¹⁵ *Kovacs*, *supra* note 13 at para 23.

¹¹⁶ *Minister CIC v Arias Garcia*, 2007 FCA 75 at para 24.

In December 2015, the Federal Court once again considered the issue of the section 285 defence and domestic violence in a refugee claim in *Puerto Rodriguez*.¹¹⁷ The case concerned a mother and minor applicant from Honduras who claimed refugee status on the basis of abuse by her husband and the risk her son faced from gang violence. The RPD found that the mother was excluded on the grounds of child abduction. As the Federal Court notes, “while the RPD accepted that the principal Applicant was a victim of abuse and extortion in the past, it found there was insufficient persuasive evidence that she was escaping a danger of imminent harm.”¹¹⁸ This approach reflects a narrow understanding of domestic abuse and how it presents ongoing danger to the abused person, even where it may not seem imminent to outsiders.¹¹⁹ It fails to recognize the role of coercive control in relationships of abuse.¹²⁰ The Federal Court ultimately overturned the decision not because of the narrow treatment of domestic violence, but because the RPD failed to consider the evidence of gang threats against the minor son.¹²¹

D. INTERNATIONAL CHILD ABDUCTION AS A DOUBLE-EDGED SWORD

As was seen in *Kovacs*, a Hague Convention application for the return of a child, even where it is rejected, can lead to an exclusion finding under Article 1F(b). However, in some refugee determination cases, the Board has found that the absence of a Hague Convention application indicates a lack of credibility towards establishing domestic violence. For instance, in a RPD decision from 2012, the Board rejected a mother and daughter who claimed on the grounds of domestic violence. In dismissing their claim, the member notes that, “Peru is a party to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. There was no evidence to indicate that XXXX, the minor claimant’s father, has been looking for the minor claimant, nor has there been any application made through the Hague Convention with regards to his daughter.”¹²² The RPD made a similar determination in a 2014 case concerning a mother and daughter claiming refugee status from Namibia.¹²³ In a decision at the RAD, the Board determined that the lack of a Hague Convention application weighed against the claimant’s subjective fear of continued violence from her spouse if she were to return.¹²⁴ In other cases, the Board has interpreted a woman leaving her children behind with her partner as indicative that she is not credible in her claim that the partner was abusive.¹²⁵ Such decisions fail to consider the risks created by the Hague Convention and Article 1F(b) for a woman who takes her children with her.

International child abduction laws thus cut against women fleeing domestic violence in two ways. Where the left-behind spouse does not legally pursue the taken child, the RPD may find this weighs against the credibility of the woman’s claim that she faces an ongoing risk of persecution if she returns to her home country. At the same time, the lack of contextualized analysis for serious

¹¹⁷ *Puerto Rodriguez*, *supra* note 107.

¹¹⁸ *Ibid* at para 6.

¹¹⁹ See *e.g. R v Lavallee*, [1990] 1 SCR 852 (discussion of “battered woman syndrome” in the criminal defence of self-defence); see also *Paris Montoya*, *supra* note 112 at para 10 (example of a narrow approach to domestic abuse in establishing the s 285 defence).

¹²⁰ Stark, *Coercive Control*, *supra* note 34.

¹²¹ *Puerto Rodriguez*, *supra* note 107 at para 18.

¹²² *X (Re)*, 2012 CanLII 99986 (CA IRB) at para 24.

¹²³ *X (Re)*, 2014 CanLII 96903 (CA IRB) at para 56.

¹²⁴ *X (Re)*, 2014 CanLII 53769 (CA IRB) at paras 9-10.

¹²⁵ See *e.g. X (Re)*, 2013 CanLII 98676 (CA IRB) at para 19.

non-political crimes and narrow defence for child abduction in Canadian law may exclude a mother from claiming refugee status based on the domestic violence of her left-behind partner. Examining international child abduction laws from an immigration lens thus reveals a myriad of other ways that the Hague Convention may exacerbate the vulnerability of women fleeing domestic violence across national boundaries with their children.

IV. CONCLUSION: SOME SUGGESTIONS FOR LEGAL INTERVENTION

Most critiques of the Hague Convention in the context of domestic violence have focused on how the regime itself should be rewritten or re-interpreted to recognize the devastating effects of domestic violence on children.¹²⁶ Through centering the interaction of family law and refugee law in this regime, this paper concludes by offering a few other suggestions about how we might maintain the laudable goal of protecting children from the harmful effects of abduction while protecting the principle of *non-refoulement* for women and children fleeing domestic violence.

A. CHANGES TO HAGUE CONVENTION APPLICATIONS IN CANADA

In the family law context, the *AMRI* decision provides strong guidelines to judges about safeguards that should be in place where a child has been granted refugee status. However, as was discussed above, there is no obligation on family law courts to wait until the resolution of the refugee claim. It is suggested that where the application is based on domestic violence, there should be a presumption to wait to address the Hague application until the resolution of the corresponding refugee claim.

According to the 2008 statistical survey on the Hague Convention, in Canada the mean duration of proceedings was 137 days for a return and 121 days for a refusal.¹²⁷ The *IRPA* requires refugee hearings to be scheduled within sixty days of the filing of the asylum claim.¹²⁸ However, the Refugee Protection Division (RPD) rarely meets these timelines. In January 2018, the Immigration Refugee Board informed new refugee claimants that they should expect their claims to be heard within twelve to twenty four months, despite the regulations.¹²⁹ Although the Ontario Court of Appeal has stated in *AMRI*, “[e]xpeditency will never trump fundamental human rights,” it is unlikely that Ontario family law judges will allow for such a significant additional delay to interfere with the Hague Convention’s objective to deal with matters expeditiously.¹³⁰ Therefore, I would suggest that while these RPD delays exist, it may be necessary to create a mechanism to “fast-track” refugee claims, where a left-behind parent has begun Hague Convention proceedings, in order to ensure these claims are heard within the sixty day timeline. Doing so would prevent the

¹²⁶ See *e.g.* Lindhorst & Edleson, *supra* note 9; Schuz, *supra* note 8 at 282-84.

¹²⁷ Nigel Lowe, “A Statistical Analysis of Applications Made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*,” Preliminary Document No 8 (May 2011), online: <assets.hcch.net/upload/wop/abduct2011pd08c.pdf> [perma.cc/G98E-AG98].

¹²⁸ *Immigration and Refugee Protection Regulations*, SOR/2002-22, s 159.9(1)(b).

¹²⁹ Nicholas Keung, “Canada’s refugee board abruptly changes its scheduling system amid surging backlog” *Toronto Star* (26 January 2018), online: <thestar.com/news/immigration/2018/01/26/canadas-refugee-board-abruptly-changes-its-scheduling-system-amid-surging-backlog.html>.

¹³⁰ *AMRI*, *supra* note 41 at para 125.

undue delay of a Hague application, while also ensuring that children who meet the definition of refugee can access the procedural safeguards established by the Court of Appeal in *AMRI*. That stated, taking parents could face significant barriers in establishing the grave risk exception should their refugee claim fail before their Hague Convention hearing.

Another potential area for change that would assist custodial parents and their children fleeing domestic violence is in the interpretation of the meaning of “habitual residence.” The interpretation of the child’s habitual residence will determine whether or not the mechanism for return under the Hague Convention is available. The jurisprudence in Canada is currently mixed on whether a court should take into account only joint parental intention when interpreting the meaning of habitual residence or instead focus on the reality of the child.¹³¹

Requiring joint parental intention to change a child’s habitual residence eliminates the opportunity for the habitual residence to shift where a parent is fleeing domestic violence with their child. The Ontario Court of Appeal ruled recently in *Balev v Baggott* that a shared parental intention was required to change a child’s habitual residence.¹³² However, at the time of publication of this article, the Supreme Court of Canada has heard the appeal in *Office of the Children’s Lawyer v John Paul Balev, et al.*, where the main issue is the interpretation of “habitual residence” in the context of the Hague Convention.¹³³

A child-centred approach to the determination of habitual residence would allow the court to find that a child’s habitual residence is Canada where the child’s intention, whether or not that intention is aligned with one of the parents, was to claim refugee status and, therefore, remain in Canada. A child-centred approach would be particularly helpful, therefore, for cases where an older child has left the country on their own or with a parent fleeing domestic violence. Rather than require both parents to intend that the child relocate in order to establish that the habitual residence had shifted to Canada, the court should consider whether the *child* understood the move and their integration into their new community to be permanent, giving their views due weight in accordance with their age and abilities. Such an approach would require giving more weight to the voice of the child, in line with children’s section 7 rights as articulated in *AMRI* and Canada’s international legal obligations under the *Convention on the Rights of the Child*.¹³⁴ If the child’s habitual residence has shifted to Canada as a result of the making of a refugee claim, the Hague Convention will no longer provide a mechanism for return.

Therefore, a more child-centric approach to the interpretation of “habitual residence” in the adjudication of these cases may help to ensure that Hague Convention applications are not used to force the return of children seeking refugee status, either alone or with a parent fleeing domestic violence. Even where a refugee claim is unsuccessful, the very act of making the claim could weigh towards a finding that the habitual residence had shifted to Canada. Unfortunately, this potential shift in the law may not be able to assist parents fleeing with younger children, as the weight given to a child’s views is dependent on their age and abilities. However, it should play an important role for older children, and their parent, who view their move to Canada as a permanent one.

Hopefully, the Supreme Court will consider the negative effects of an interpretation of habitual residence requiring shared parental intention on mothers and children who are fleeing

¹³¹ See e.g. *DMD v EH*, [2000] QJ No 2967 at paras 26-30 (QCCA); *Chan v Chow*, 2001 BCCA 276 at paras 32-35, 39-42; *Ellis*, *supra* note 32 at paras 27-33.

¹³² *Balev v Baggott*, 2016 ONCA 680.

¹³³ *Office of the Children’s Lawyer v John Paul Balev, et al*, 2017 CanLII 23874 (SCC).

¹³⁴ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, art 12.

domestic violence and the importance of a child centred approach in its upcoming decision in *Office of the Children's Lawyer v John Paul Balev, et al.*

B. REFUGEE LAW SOLUTIONS

From a refugee law perspective, there may be hard and soft law solutions to the issue of the interpretation of international child abduction in the operation of Article 1F(b). As a preliminary step, the IRB and Citizenship and Immigration Canada could amend the Gender Guidelines and ENF24-Ministerial Interventions to address this issue. ENF24-Ministerial Interventions should have considerably more information on the role that domestic violence may play in a decision to flee with a child and how “imminent harm” should be read broadly to incorporate ongoing domestic abuse and forms of coercive control. Further, the Gender Guidelines could include a section on how Members should be careful about the exclusion of a woman for child abduction where their claim is based on domestic abuse.

While the Gender Guidelines are not legislation, “failure to apply them in appropriate cases may constitute a reviewable error.”¹³⁵ However, as Dauvergne and Labman have stated, “[h]aving guidelines can only take the decision-maker so far.”¹³⁶ There is a large body of Federal Court decisions that address IRB members’ “basic lack of sensitivity” in regard to domestic violence and gender-based persecution claims.¹³⁷ Although changing the Gender Guidelines may be an important step, it is unlikely to go far enough to ensure IRB members approach parental child abduction cases, where there has been domestic violence, with sufficient insight or sensitivity.

A more effective solution may be to advance the argument put forth in *Puerto Rodriguez* and *AB* that in many cases parental child abduction does not actually meet the definition in Article 1F(b). Where a parent has custody, their act of leaving the country with their child without the other parent’s consent only becomes criminal upon remaining in Canada past a certain time. Therefore, it does not meet the meaning within Article 1F(b) of having “committed a serious non-political crime *outside the country of refuge*.”¹³⁸ If the crime takes place within Canada, it should fall under the analysis for inadmissibility for serious criminality on the basis of child abduction, which would require an actual conviction.¹³⁹ Thus far, as described above, the Federal Court has not addressed or certified a question on this issue.

Requiring an analysis of where the alleged criminal act actually took place would allow for a differentiation between a custodial parent leaving with their child and a non-custodial parent or non-parent abducting a child across state lines. In addition to being a more accurate application of Article 1F(b), such an approach would ensure that a victim of domestic violence who flees with her children would not be unfairly excluded from establishing a refugee claim. Custodial parents

¹³⁵ See *e.g. Selvarany Aripasatham v Canada (Minister of Citizenship and Immigration)*, 2016 FC 16 at para 15; see also *Khon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 143 at paras 18-20.

¹³⁶ Catherine Dauvergne & Shauna Labman, “Canada’s Approach to Gender-Related Persecution — Revisiting and Re-Embracing ‘Refugee Women and the Imperative of Categories’” (2014) in Efrat Arbel et al, eds., *Gender in Refugee Law: From the Margins to the Centre* (London: Routledge, 2014) at 282 [Dauvergne & Labman, “Revisiting ‘Refugee Women’”].

¹³⁷ *Fontenelle v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1155 at para 61; See Dauvergne & Labman, “Revisiting ‘Refugee Women’,” *supra* note 126; Constance MacIntosh, “Domestic Violence and Gender-Based Persecution: How Refugee Adjudicators Judge Women Seeking Refuge from Spousal Violence — and Why Reform is Needed” (2010) 26:2 *Refugee* 147.

¹³⁸ *Refugee Convention*, *supra* note 3, art 1F(b) [emphasis added].

¹³⁹ See *IRPA*, *supra* note 10, s 36(1)(c).

would still be subject to returning the child based on a successful Hague Convention application and would still be required to establish the actual merits of their claim.

These interventions could go a long way towards addressing the challenge of protecting children against international child abduction while allowing women and children to seek refuge in cases of domestic violence. More broadly, this article has demonstrated how the interaction of family, immigration, and at times criminal law, operate to regulate the mobility of mothers and children fleeing domestic violence. While the number of cases where Hague Convention applications and refugee claims directly overlap is small, they illuminate the broader operation of family and immigration regimes to regulate intimate relationships. This paper reveals how these regimes may operate to exacerbate vulnerabilities when children are returned to abusive parents or mothers are excluded from making refugee claims. Without concrete solutions such as those offered above, these problems will continue to arise as families form and fracture across national borders.