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# The Supreme Court Got at Least One Thing Right This Term

*The Supreme Court's ruling in 'Golan v. Saada' will have the biggest impact on victims of domestic violence, who are the most common respondents in the Hague Convention's "grave of risk of harm" cases.*

*By Valentina Shaknes and Justine Stringer*
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On June 15, 2022, the Supreme Court of the United States unanimously held that in cases under the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention), once a finding is made that returning a child to a parent residing in a foreign country would expose the child to a "grave risk of harm," the court may refuse to return the child without considering whether any "ameliorative measures" may be implemented in that foreign country to mitigate the risk of harm. *Golan v. Saada*, 596 U.S. ___ (2022). This decision brings to an end a long-term split among the U.S. federal circuit courts, where some courts required a mandatory consideration of ameliorative measures post finding of the grave risk of harm and others expressly refused to do so. Most significantly, for the first time, the Supreme Court explicitly held that "the Convention sets as a primary goal the safety of the child." In doing so, the Supreme Court rejected the long-held view of some federal circuit courts that the Convention "pursue[s] return exclusively or at all costs."

The Hague Convention requires a signatory state promptly to return a child "wrongfully" removed by one parent without the consent of the other parent to that state from another signatory state where the child habitually resided. The Hague Convention, however, expressly allows a court of a country to which a child was removed to refuse to return the child to her country of habitual residence if such return would expose the child to a "grave risk of physical or psychological harm." Neither the Convention nor the implementing legislation of any signatory country contains any additional requirements for the application of this "grave risk of harm" defense. Nevertheless, prior to *Golan v. Saada*, several U.S. federal circuit courts, including the Second Circuit, from which this appeal was taken, required that the party asserting the "grave risk of harm" defense also prove that no ameliorative measures could be put into place to ensure adequate protection of the child in her country of habitual residence.

In the circuits that adopted the "ameliorative measures" requirement, i.e., the Second, Third and Sixth Circuits, upon a finding of grave risk of harm, courts were required to analyze whether the judicial system in the country of the child's habitual residence could appropriately enforce "ameliorative measures" that would alleviate the harm to the child upon her return. See, e.g., *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 2013) (Even after a finding that grave risk of harm exists, courts require a determination whether "any ameliorative measures (by the parents and by the authorities of the [home] state) … can reduce whatever risk might otherwise be associated with a child's repatriation."); *Simcox v. Simcox*, 511 F.3d 594, 605 (6th Cir. 2007) ("[E]ven when confronted with a grave risk of harm, some courts have exercised the discretion given by the Convention to nevertheless return the child to the country of habitual residence, provided sufficient protection was afforded.") (internal citations omitted); *see also Larrategui v. Laborde*, 2014 WL 128048, *7 (E.D. Cal. 2014) ("Courts have the authority to impose conditions, known as undertakings, to ensure that a potential harm does not manifest when a child returns to his or her country of habitual residence.").

Conversely, the circuit courts that have refused to consider ameliorative measures, like the Seventh and Eleventh Circuits, recognized that even were a court able to construct sufficient undertakings, the practical reality of people either complying with such undertakings voluntarily or the legal system in the country of habitual residence enforcing them was far from certain. *See, e.g., Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005) ("There is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations …. To give a father custody of children who are at great risk of harm from him, on the ground that they will be protected by the police of the father's country, would be to act on an unrealistic premise.").

The Supreme Court unambiguously has sided with the latter group of circuits, ruling that the Convention "does not impose[] a categorical requirement on a court to consider any or all ameliorative measures before denying return once it finds that a grave risk exists." The court equally unambiguously has rejected the long-standing precedents in the former group of circuits, ruling that "[t]he Second Circuit's rule, by instructing district courts to order return 'if at all possible,' improperly elevated return above the Convention's other objectives."

The court's decision thus at long last recognizes that no matter how well-meaning courts in the United States may have been in trying to fashion measures to protect the children while also returning them to their home country, this approach was fundamentally flawed for several reasons, including that once a child is back in their country of habitual residence, a United States court has little to no power to enforce compliance with its orders, thus rendering meaningless any ameliorative measure put into place. As the court noted, a U.S. court should "decline to consider imposing ameliorative measures where it reasonably expects that they will not be followed."

To be sure, the court recognized that there are circumstances in which "a court may find it appropriate to consider both questions [of the grave risk of harm and ameliorative measures] at once. For example, a finding of grave risk as to a part of a country where an epidemic rages may naturally lead a court simultaneously to consider whether return to another part of the country is feasible." The court made it clear, however, that "any consideration of ameliorative measures must prioritize the child's physical and psychological safety." 596 U.S. __, at 12 (emphasis added).

The court went on to specifically identify situations where ameliorative measures would not be appropriate and should not be considered by the courts: "A court may therefore decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave. Sexual abuse of a child is one example of an intolerable situation. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child's safety that could not readily be ameliorated."

The Supreme Court's ruling will have the biggest impact on victims of domestic violence, who are the most common respondents in the Hague Convention's "grave of risk of harm" cases. Not only did the court specifically find that domestic violence, both physical and psychological, constitutes "an obvious grave risk to the child's safety," but the court also recognized that this "risk is so grave … that [it] could not readily be ameliorated." Now victims of domestic violence who have successfully shown that their child would face a grave risk of harm upon return will no longer be required also to prove that there are no ameliorative measures that would remove or mitigate that harm. Practically speaking, this means that victims of domestic violence will no longer be forced to return to their home country (and their abusers) because a court in the United States thought that some "measures" could be put into place in a foreign country that would "ameliorate" the harm.

A year ago, in a previous article in this publication, the authors of this article argued in support of precisely this result. The authors also filed an amicus curiae brief in *Golan v. Saada* on behalf of a group of Italian domestic violence organizations, advocating for a rejection of the ameliorative measures requirement. After a slew of troubling decisions that came out of the Supreme Court this term, the authors are relieved to see that the Supreme Court got this one right.

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