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Ameliorative Measures Gut the Grave Risk Exception Under the Hague Convention

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'Ameliorative measures' do not protect children facing 'grave risk of harm' upon return to home country under the Hague Convention and consideration of such measures should be eliminated by the U.S. Supreme Court.

The Hague Convention on Civil Aspects of International Child Abduction (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 doing so would expose the child to a "grave risk of physical or psychological harm."

In the United States, this "grave risk of harm" defense has been upheld in two situations. First, it has been recognized in cases where the return would put the child in imminent danger, such as returning the child to a zone of war, famine or disease. Second, the defense has been recognized in cases of serious abuse or neglect, or extraordinary emotional dependence, where the courts in the country of habitual residence cannot or will not give the child adequate protection. Many cases in the second category arise from a backdrop of domestic violence, when one parent flees the home country with the child, claiming domestic abuse by the other parent. The Hague Convention places a high burden of proof on the parent asserting the grave risk of harm defense, requiring that "grave risk" to the child be proven by clear and convincing evidence.

In cases where this high burden is met, the Hague Convention expressly allows the court not to return the child to her country of habitual residence. Neither the Convention nor the implementing legislation

of any signatory country contains any additional requirements for the application of the "grave risk of harm" defense. Nevertheless, some U.S. federal circuit courts have imposed such additional requirement—to prove that no ameliorative measures can be put into place to ensure adequate protection of the child in her country of habitual residence.

Analyzing Ameliorative Measures Under the Hague Convention

In the circuits that adopted the "ameliorative measures" requirement, courts are directed to analyze whether the judicial system in the country of the child's habitual residence can appropriately enforce "ameliorative" measures that would eliminate 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, some 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.").

In assessing ameliorative measures, courts often impose certain "undertakings" on the parent seeking the return of a child that must be followed upon the child's return. These "undertakings" are designed to protect the child from harm while custody proceedings are pending in the court of the country of habitual residence. In *Sabogal v. Velarde,* notwithstanding that the mother met her burden of proving the children would suffer a grave risk of harm upon return to Peru by clear and convincing evidence, the District Court nonetheless directed that the children be returned to Peru if the father arranged for the temporary order in Peru granting him custody be vacated prior to their return and that upon such, he pay for the mother and children's relocation and living expenses during the pendency of the custody case. *Sabogal v. Velarde,* 106 F. Supp. 3d 689, 710 (D. Md. 2015). In another case, *Rial v. Rijo,* the Southern District of New York determined there were sufficient undertakings in place to return the child where the father agreed to rent an apartment for the mother and child, not to press charges for child abduction and to pursue the dismissal of any previously filed charges, and to pay child support to the mother. *Rial v. Rijo,* 2010 WL 1643995, *3 (S.D.N.Y. 2010).

Circuit Split

Because this added requirement is not found in the text of the Hague Convention itself, several federal circuit courts have explicitly declined to require consideration of ameliorative measures. This has resulted in a circuit split, with the Second, Third and Sixth Circuits requiring consideration of such ameliorative measures, and the Seventh and Eleventh Circuits explicitly declining to do so.

Courts requiring an assessment of ameliorative measures state that, by allowing the child to be safely returned to the home country despite the finding of grave risk of harm, undertakings "accommodate [both] the interest in the child's welfare [and] the interests of the country of the child's habitual residence." *Simcox v. Simcox,* 511 F.3d at 606 (internal citation omitted); see also *Walsh v. Walsh,* 221 F.3d 204, 219 (1st Cir. 2000) ("The undertakings approach allows courts to conduct an evaluation of the placement options and legal safeguards in the country of habitual residence to preserve the child's safety while the courts of that country have the opportunity to determine custody of the children within the physical boundaries of their jurisdiction.").

The courts that refuse to consider ameliorative measures, on the other hand, find that even if a court were 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 is 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.")

'Saada v. Golan'

In April 2021, the Supreme Court of the United States, upon a petition for writ of certiorari in *Saada v. Golan,* has invited the Acting Solicitor General to file a brief expressing the views of the United States with respect to the question of whether consideration of ameliorative measures is necessary after a finding of grave risk of harm under Article 13(b) of the Hague Convention. In that case, the Eastern District of New York found that while the mother met her burden of proving by clear and convincing evidence that the child would suffer a grave risk of harm if returned to Italy, the court nonetheless directed a return of the child after considering the ameliorative measures and directing the father to pay the mother $30,000 and to stay away from the mother and child. *Saada I*, 2019 WL 1317868, *19 (E.D.N.Y. 2019).

On appeal, the Second Circuit vacated the district court's decision and remanded the case for a determination of whether there were any other enforceable or sufficiently guaranteed ameliorative measures available. The Circuit Court ruled that to eliminate a grave risk of harm, the ameliorative measures must be either enforceable by the district court or supported by other sufficient guarantees of performance. The court further found that because the district court could not enforce its rules with respect to the father staying away from the child in Italy, the grave risk of harm could not be appropriately ameliorated by that measure alone. *Saada II*, 930 F.3d 533, 540-41 (2d Cit. 2019).

On remand, the district court directed the parties to petition the Italian courts for an order directing the father to stay away from the child, the parties complied, and such order was entered in Italy. In light of that order, the district court granted the father's petition for the child to be returned, finding that the father was likely to comply with the Italian court order based upon his history of compliance with court orders. In addition, the District Court directed the father to pay $150,000 to the mother to cover her and the child's living expenses during the custody proceeding in Italy. *Saada III*, 2020 WL 2128867, *6 (E.D.N.Y. 2020). The Second Circuit affirmed. *Saada III,* supra at 834.

Assuming certiorari is granted, how will the Supreme Court rule? The original purpose of the Hague Convention is to deter parents from abducting their children to other countries. At its core, the primary objective of the Convention is to ensure that custody disputes are determined by the courts of the child's country of habitual residence, as such courts are likely better equipped to make such determinations. When some U.S. courts started requiring a consideration of ameliorative measures, they reasoned that, by making it more likely for a child to be returned to her home country, such consideration was consistent with the purpose of the Hague Convention.

By including the "grave risk of harm" defense, however, the Convention also explicitly recognizes that the goal of having the courts of the home country determine a child's custody can never come at the expense of the child's safety and wellbeing. When well-meaning courts, after finding that the child would indeed face a great risk of harm upon return, nevertheless began considering "ameliorative

measures" and "undertakings" so they could return the child despite such finding of grave risk, they certainly thought such measures would protect the child from the harm. But although well-meaning, this approach is fundamentally flawed. As the *Saada II* court recently acknowledged, as a practical matter, once the child is back in the country of habitual residence, a U.S. court has little or no power to enforce compliance with its orders, rendering meaningless any ameliorative measure it had put in place. Accordingly, although well-meaning, a requirement that ameliorative measures be considered after a finding of grave risk ultimately guts the intended purpose of the Article 13(b) defense to protect children from being returned to a place where they will face a grave risk of harm.

We hope that the Supreme Court will agree with the Seventh and Eleventh Circuits and clarify that the Hague Convention does not require an assessment of ameliorative measures after a finding of grave risk of harm, as such requirement renders the Article 13(b) defense nearly impossible in many cases to be successful—something the drafters of the Hague Convention clearly did not intend.

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