Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Golan v. Saada: Protecting Domestic Abuse Survivors in International Child Custody Disputes

MOLSHREE “MOLLY” A. SHARMA*

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (Convention) is a multilateral treaty with 102 signatories that provides for the expeditious return of children to their country of habitual residence when one parent removes the child to another country without legal permission or agreement of the other parent.[1] However, if a court finds that an exception applies, the court may deny return even when a child was wrongfully removed, including in the case of a child who would be placed in a “grave risk” of physical or psychological harm or an “intolerable situation.”[2] In many cases, this “grave risk” of harm involves domestic

*Molshree “Molly” A. Sharma is a partner at Birnbaum Gelfman Sharma & Arnoux LLC. Her family law practice includes international custody disputes under the Hague Convention on the Civil Aspects of International Child Abduction. With special gratitude to Cora Leeuwenburg, Associate Attorney, Birnbaum Gelfman Sharma & Arnoux LLC, who did extensive research and work on this article.

1. Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, T.I.A.S. No. 11,670, 1243 U.N.T.S. 89 [hereinafter Convention]; *Status Table, 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIV. INT’L LAW, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 (last updated Oct. 18, 2022) [hereinafter Convention Status Table].

2. Convention, *supra* note 1, art. 13 (stating that “[n]otwithstanding 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 a listed exception is established by the party opposing return).

251 3/27/2023 7:14:06 PM

violence, including violence by one parent directed at the other parent—as was seen in the 2022 Supreme Court case *Golan v. Saada*.[3]

Before 2022, there was a split in U.S. courts regarding whether a child should be returned even when the "grave risk" exception was proven by clear and convincing evidence, based on the availability of "ameliorative measures" that could help to protect the child.[4] In an effort to balance the well-being of the child with the overarching purpose of the Convention, some circuit courts required consideration of whether "ameliorative measures" or "undertakings" were available that could limit the risk to the child.[5] Other circuits did not mandate consideration of these measures, which are not specifically mentioned anywhere in the Convention.[6] This issue was recently clarified by the Supreme Court through its ruling in *Golan v. Saada* on June 15, 2022.[7]

This article will discuss the competing concerns that the courts have attempted to balance in implementing the Convention, review the previous split in the circuits and weight given to ameliorative measures, and summarize the ultimate decision in *Golan v. Saada*. Part I provides an overview concerning the Convention and the "grave risk" exception to return. Part II discusses the lower court proceedings in *Golan v. Saada*. Part III reviews the issues before the Supreme Court as presented in the certiorari petition and response. Part IV summarizes the circuit split that preceded the *Golan* decision. Part V reviews the Supreme Court's decision in favor of Narkis Golan, the mother and survivor of domestic violence who had asserted the "grave risk" defense in this case. Part VI discusses the proceedings on remand and Ms. Golan's tragic death. The Conclusion considers the decision's significance.

3. 142 S. Ct. 1880 (2022); Julianne McShane, *Family Questions Death of Domestic Violence Victim Whose Case Made It to Supreme Court Following Yearslong Custody Battle*, NBC News (Oct. 26, 2022, 2:43 PM EDT), https://www.nbcnews.com/news/crime-courts/supporters-vow-continue-fight-deceased-domestic-violence-victim-whose-rcna53966 ("Although there are no definitive statistics, research estimates that domestic violence could be a factor in up to 70% of Hague Convention child abduction cases.").

4. *Golan*, 142 S. Ct. at 1891 & n.6; *see* Tracy Bateman Farrell, *Construction and Application of Grave Risk of Harm Exception in Hague Convention on the Civil Aspects of International Child Abduction as Implemented in International Child Abduction Remedies Act, 42 U.S.C.A. § 11603(e)(2)(A)*, 56 A.L.R. Fed. 2d 163 (2011).

5. *Golan*, 142 S. Ct. at 1887, 1890 n.4.

6. *Id.* at 1891 n.6, 1892; *see* Convention, *supra* note 1.

7. *Golan*, 142 S. Ct. 1880.

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

I. The Convention on the Civil Aspects of International Child Abduction

The Convention, which is implemented in the United States through the International Child Abduction Remedies Act (ICARA), governs the unlawful removal of children from one foreign state to another through parental child abduction.[8] As stated in the preamble, the Convention aims to "protect children internationally 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. . . ."[9] The Convention further dictates that wrongfully removed children must be returned to their "habitual residence" unless an exception is found to apply, in which case the court has discretion to deny return.[10] For example, Article 13(b) provides that return of a child is not required if a party establishes that "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."[11]

The Convention was established "in response to the problem of international child abductions during domestic disputes."[12] In order to satisfy the aims of the Convention, the concept of a child's "habitual residence" was established.[13] However, the Convention itself does not define habitual residence, and the ambiguity resulted in extensive U.S. case law attempting to define the term.[14] In 2020, in *Monasky v. Taglieri*, the U.S. Supreme Court determined that habitual residence is a fact-driven finding that requires courts to consider "the totality of the circumstances specific to the case."[15]

Following a determination that the child has been wrongfully removed or retained away from the child's habitual residence, the court must order return of the child unless one of the exceptions to the prompt return of the child is

8. *See* Convention, *supra* note 1; 22 U.S.C. §§ 9001–11 [hereinafter ICARA]. The Convention entered into force on December 1, 1983, and the United States became a signatory on April 29, 1988. Convention Status Table, *supra* note 1.

9. Convention, *supra* note 1, pmbl.

10. *Id.* arts. 1 ("The objects of the present Convention are—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 of access under the law of one Contracting State are effectively respected in the other Contracting States."), 13.

11. *Id.* art. 13(b).

12. *Golan*, 142 S. Ct. at 1888 (citation omitted).

13. Convention, *supra* note 1, art. 3; *see* Ann Laquer Estin, *Where Is the Child at Home? Determining Habitual Residence After* Monasky, 54 Fam. L.Q. 127, 128 (2020).

14. Convention, *supra* note 1; *see* Estin, *supra* note 13, at 128–31.

15. 140 S. Ct. 719, 723 (2020); *see* Estin, *supra* note 13, at 131–36.

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

established.[16] A party invoking the "grave risk" exception bears the burden of showing by clear and convincing evidence that the exception applies.[17]

A. Grave Risk of Harm

The Convention's "grave risk" exception applies in cases where the return of the child to the habitual residence would "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[18] U.S. courts have applied the grave risk exception in a variety of circumstances. Some courts have found that the harm to the child "must be something greater than would normally be expected on taking a child away from one parent and passing [the child] to another."[19] Courts have found grave risk in cases where there is evidence of sexual abuse.[20] Courts have also noted that returning the child to a "zone of war, famine, or disease" could qualify as a grave risk of harm.[21] Grave risk has also been applied more broadly when there is evidence of "serious abuse or neglect, or extraordinary emotional dependence."[22] And in some cases, the grave risk exception has been considered based on a risk of harm to the removing parent, such as when one parent flees a situation of domestic abuse.[23]

16. Convention, *supra* note 1; 22 U.S.C. § 9003(e)(2).

17. 22 U.S.C. § 9003(e)(2)(A).

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

19. da Silva v. de Aredes, 953 F.3d 67, 73 (1st Cir. 2020) (citation and internal quotation marks omitted); *In re* S.L.C., 4 F. Supp. 3d 1338, 1350 (M.D. Fla. 2014); De Aguiar Dias v. De Souza, 212 F. Supp. 3d 259, 270 (D. Mass. 2016) (finding that "[t]he risk must be 'more than serious,' though it need not be 'immediate,'" and "[t]he harm involved 'must be a great deal more than minimal'") (citation omitted); Madrigal v. Tellez, 848 F.3d 669, 676 (5th Cir. 2017) (finding that "[t]he alleged harm 'must be a great deal more than minimal' and 'greater than would normally be expected on taking a child away from one parent and passing him to another'") (citation omitted); Marquez v. Castillo, 72 F. Supp. 3d 1280, 1287 (M.D. Fla. 2014); LM v. JF, 75 N.Y.S.3d 879, 890 (Sup. Ct. Nassau Cnty. 2018) (finding that "[t]he parent opposing the child's return must show that the risk to the child is grave, not just serious, and the harm must be more than a potential harm").

20. *See* Diaz-Alarcon v. Flandez-Marcel, 944 F.3d 303, 312–13 (1st Cir. 2019); Luis Ischiu v. Gomez Garcia, 274 F. Supp. 3d 339, 351 (D. Md. 2017).

21. *In re* R.V.B., 29 F. Supp. 3d 243, 258 (E.D.N.Y. 2014) (citation omitted); *see also* Velozny *ex rel.* R.V. v. Velozny, 550 F. Supp. 3d 4, 18 (S.D.N.Y. 2021), *aff'd*, No. 21-1993-cv, 2021 WL 5567265 (2d Cir. Nov. 29, 2021); Salguero v. Argueta, 256 F. Supp. 3d 630, 637 (E.D.N.C. 2017); Babcock v. Babcock, 503 F. Supp. 3d 862, 881 (S.D. Iowa 2020); De La Riva v. Soto, 183 F. Supp. 3d 1182, 1198 (M.D. Fla. 2016).

22. *See* Mohasci v. Rippa, 346 F. Supp. 3d 295, 320 (E.D.N.Y. 2018) (citation omitted), *aff'd sub nom. In re* Nir, 797 F. App'x 23 (2d Cir. 2019).

23. *See* Colchester v. Lazaro, 16 F.4th 712, 717–18, 729 (9th Cir. 2021).

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

B. Ameliorative Measures and Undertakings

Prior to the Supreme Court decision in *Golan v. Saada*, some U.S. courts required consideration of ameliorative measures after making a finding of a grave risk of harm to the child.[24] Ameliorative measures are steps that can be taken by the parties or by government officials in the return country to adequately protect the child from harm upon their return to the habitual residence for custody proceedings.[25] It is important to note that there is nothing in the text of the Convention that specifically necessitates consideration of any ameliorative measures.[26] Before *Golan*, there was a split in the courts as to whether such ameliorative measures must be considered following a court's finding of a grave risk of harm.[27]

II. Lower Court Decisions in *Golan v. Saada*

Golan v. Saada began in the Eastern District of New York when the father and petitioner, Isacco Jacky Saada, brought the case against the mother and respondent, Narkis Aliza Golan, for the return of the parties' child (born in Italy in 2016 after the parties' 2015 marriage), referred to as B.A.S.[28] Mr. Saada, an Italian citizen, alleged that Ms. Golan, a U.S. citizen who had lived with Mr. Saada and B.A.S. in Italy, wrongfully kept the child in the United States in August 2018.[29] Upon review of the facts, the trial court found on March 22, 2019, that the child's habitual residence was Italy.[30] The trial court also determined that based on the presented facts, Ms. Golan had "established by clear and convincing evidence that returning the child to Italy would subject the child to a grave risk of harm."[31] The finding came after a review of numerous instances of abuse by Mr. Saada against Ms. Golan, often in the presence of the child, and the testimony of multiple child psychologists who agreed that exposure to such domestic violence would cause significant psychological harm to the child.[32]

Following the finding of a grave risk of harm to B.A.S., the court considered ameliorative measures that would allow for the safe return of Ms.

24. Golan v. Saada, 142 S. Ct. 1880, 1891 & n.6 (2022); *see* Farrell, *supra* note 4.
25. *Golan*, 142 S. Ct. at 1887.
26. *Id.* at 1892.
27. *See infra* Part IV; *see also Golan*, 142 S. Ct. at 1891 & n.6; Farrell, *supra* note 4.
28. Saada v. Golan, No. 18-CV-5292, 2019 WL 1317868, at *1–2 (E.D.N.Y. Mar. 22, 2019), *aff'd in part, vacated in part*, 930 F.3d 533 (2d Cir. 2019).
29. *Id.* at *1–3.
30. *Id.* at *17.
31. *Id.* at *18.
32. *Id.* at *4–12, *18.

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Golan and the child.[33] The trial court instructed the parties to each propose ameliorative measures that would satisfy the aims of the Convention and permit the speedy return of the child to Italy for custody proceedings, but also would protect the child from the harm determined to be a grave risk.[34]

The trial court ordered the following ameliorative measures for Mr. Saada to take, consistent with what he had proposed: (1) provide Ms. Golan with $30,000 prior to the child's return, for housing in Italy without limitations regarding location, financial support, and legal fees for custody proceedings in Italy; (2) establish a mutual agreement to stay away from Ms. Golan until the Italian courts determined custody; (3) seek dismissal of criminal charges against Ms. Golan for abducting B.A.S.; (4) partake in cognitive behavioral therapy in Italy; and (5) waive any rights to legal fees or costs for the return proceeding.[35] The court also ordered Mr. Saada to provide all records relating to the U.S. proceedings to the Italian court presiding over the forthcoming custody proceedings, to provide a sworn statement regarding the measures he would take "to assist Ms. Golan in obtaining legal status and working papers in Italy," and to withdraw any civil actions against Ms. Golan.[36] The trial court determined that such ameliorative measures were sufficient to grant Mr. Saada's petition, and ordered the return of the child to Italy for custody proceedings.[37]

Ms. Golan appealed the trial court's decision to the Second Circuit. On July 19, 2019, the decision was affirmed in part, vacated in part, and remanded.[38] Among other things, the appellate court considered the trial court's ordered ameliorative measures.[39]

The Second Circuit found that a number of the ameliorative measures ordered by the trial court were unenforceable as they were ultimately based upon Mr. Saada's agreement to comply.[40] The court found that the condition requiring Mr. Saada to stay away from Ms. Golan was insufficient as "[t]he District Court's factual findings provide ample reason to doubt that Mr. Saada will comply. . . ."[41] The court also noted that "[t]here is some dispute concerning whether it is appropriate for courts in the United States to condition orders of return on a foreign court's entry of an order containing

33. *Id.* at *18–19.
34. *Id.* at *18.
35. *Id.* at *19–20.
36. *Id.* at *20.
37. *Id*. at *19–20.
38. Saada v. Golan, 930 F.3d 533, 543 (2d Cir. 2019).
39. *Id*. at 539–42.
40. *Id.* at 540.
41. *Id.*

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

similar protective measures."[42] Nonetheless, the Second Circuit stated that by their assessment, international comity did not preclude district courts from ordering a party to "apply to courts in the country of habitual residence for any available relief that might ameliorate the grave risk of harm to the child."[43]

The Second Circuit ultimately concluded that following a finding of grave risk of harm, undertakings that are unenforceable are generally disfavored, especially when there is reason to believe that the ordered party may not comply with such an undertaking.[44] The court determined that, based on Mr. Saada's credibility and the lack of "sufficient guarantees of performance," the trial court erred in granting Mr. Saada's petition for return subject to largely unenforceable measures.[45] Nonetheless, the court did not find that "*no* protective measures" existed that would be sufficient to protect the child upon return.[46] Thus, the Second Circuit remanded the case for further consideration of ameliorative measures.[47] The court directed the district court "to consider whether there exist alternative ameliorative measures that are either enforceable by the District Court or supported by other sufficient guarantees of performance" in order to ensure the child's safe return to Italy.[48]

Upon remand, the district court determined on May 5, 2020, that certain measures already taken by Mr. Saada in Italy, coupled with a series of additional measures, were both enforceable and sufficient to protect the child upon return.[49] One key factor considered by the court was that on December 12, 2019, an order was issued by the Court of Milan providing for the protection of Ms. Golan and B.A.S., directing that Mr. Saada stay away from both Ms. Golan and the child at the child's place of residence, Ms. Golan's place of work, the child's school, and other places frequented by them, effective immediately upon their return to Italy.[50] The Milan order also required Mr. Saada to submit to cognitive behavioral therapy overseen by Italian Social Services, and granted Mr. Saada supervised parenting time.[51] The district court found that the Milan order, coupled with Mr. Saada

42. *Id.* at 541.
43. *Id.* at 541–42.
44. *Id.* at 540–41.
45. *Id.* at 542–43.
46. *Id.* at 543 (emphasis added).
47. *Id.*
48. *Id.*
49. Saada v. Golan, No. 1:18-CV-5292, 2020 WL 2128867, at *1, *3 (E.D.N.Y. May 5, 2020), *aff'd*, 833 F. App'x 829 (2d Cir. 2020), *vacated and remanded*, 142 S. Ct. 1880 (2022).
50. *Id.* at *3; *Saada*, 833 F. App'x at 832.
51. *Saada*, 2020 WL 2128867, at *3–4.

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

paying Ms. Golan $150,000 before her return to cover expenses and provide her with stability during the pending proceedings in Italy, were sufficient measures to ameliorate the risk to the child, and again granted Mr. Saada's petition for return of the child.[52]

Ms. Golan again appealed the decision to the Second Circuit. On October 28, 2020, the Second Circuit affirmed the district court's decision, finding that the undertakings ordered by the district court this time were "either enforceable by the District Court or . . . supported by other sufficient guarantees of performance."[53] Ms. Golan's petition for a writ of certiorari was granted by the Supreme Court on December 10, 2021.[54]

III. Question Before the Supreme Court

The question before the Court as presented by the petitioner (Ms. Golan) was as follows:

> Whether, upon finding that return to the country of habitual residence places a child at grave risk, a district court is required to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding.[55]

The question before the Court as stated by the respondent (Mr. Saada) was as follows:

> Whether a District Court, after a finding of grave risk, or as part of a grave risk analysis, is required to examine "the range of remedies" that, in its discretion, would permit the return of children to their habitual residence with sufficient "protection from harm" so that custody proceedings can commence in the country of habitual residence.[56]

This section reviews the parties' arguments as to whether certiorari should be granted, as they provide context for the issue before the Court.

52. *Id.* at *5.

53. *Saada*, 833 F. App'x at 833 (quoting Saada v. Golan, 930 F.3d 533, 541 (2d Cir. 2019)).

54. Golan v. Saada, 142 S. Ct. 638 (2021).

55. Petition for a Writ of Certiorari at I, Golan v. Saada, 142 S. Ct. 1880 (2022) (No. 20-1034) [hereinafter Petition].

56. Affirmation in Opposition to Petition for a Writ of Certiorari at i, Golan v. Saada, 2021 WL 327756 (No. 20-1034) [hereinafter Opposition].

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

A. Ms. Golan's Petition for Writ of Certiorari

1. Separation of Powers

Noting that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text," Ms. Golan argued that ameliorative measures should not be considered following the finding of a grave risk of harm.[57] Ms. Golan pointed to the text of Article 13(b), which itself does not require ameliorative measures to be considered following a grave risk finding.[58] Therefore, requiring courts to consider such measures encroached on the separation of powers through judicial overreach.[59]

2. Enforceability

Ms. Golan also raised certain policy concerns, including the international enforceability of undertakings ordered in U.S. courts but necessarily enforced in a foreign country.[60] Ms. Golan stated that U.S. courts "retain no power to enforce [conditional return] orders across national borders."[61] Ms. Golan noted that lack of enforceability was especially concerning in cases of domestic abuse, as studies have shown abusers to be likely to violate court orders protecting victims of abuse.[62]

3. Domestic Abuse

In her petition, Ms. Golan cited U.S. State Department guidance providing that "when there is 'unequivocal evidence that return would cause the child a "grave risk" of physical or psychological harm,' it would be 'less appropriate for the court to enter extensive undertakings than to deny the return request.'"[63] Ms. Golan noted that despite discussion regarding the possibility of the use of ameliorative measures, only two circuit court cases, both from the Second Circuit, had actually ordered the return of a child following a grave risk finding.[64] Further, she argued that the aim of the Convention is to protect children first and foremost, and to see their return

---

57. *See* Petition, *supra* note 55, at 18 (citing Medellin v. Texas, 552 U.S. 491, 506 (2008)).
58. *Id.* at 6, 18–19.
59. *Id.* at 19 ("[T]he judicially created requirement that courts fashion ameliorative measures to allow return of children in circumstances of grave risk—measures that are not mentioned in the text of the treaty that Congress ratified—raises serious separation-of-powers concerns.").
60. *Id.*
61. *Id.* (quoting Baran v. Beaty, 526 F.3d 1340, 1350 (11th Cir. 2008)).
62. *Id.* at 19–20.
63. *Id.* at 4, 23–24 (quoting Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Dep't of State, to Michael Nicholls, Lord C.'s Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995)).
64. *Id.* at 5.

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

to their country of habitual residence second.[65] She cited various guidance issued by family law journals and reports to support this argument.[66] Ms. Golan also pointed to the State Department's advisory, which counsels against extensive ameliorative measures in cases of abuse.[67] Additionally, she cited evidence that in cases of domestic abuse, an abuser is not likely to be deterred by protective orders.[68]

Ms. Golan discussed how her own circumstances demonstrated flaws in the Second Circuit's rulings:

> The instant case illustrates the problem with the court of appeals' approach. Applying the Second Circuit's framework, the district court ordered the return of B.A.S. to Italy—despite finding that B.A.S. would be subject to the grave risk of an abusive father upon that return—because his father was willing to consent to a protective order and pay some money. That approach ignores the facts that domestic violence by definition demonstrates indifference to the law, and that the authorities in the home country did not prevent or stop the abuse, leading the victim to flee. And, as a result, it threatens the safety of children and their caregivers.[69]

B. Mr. Saada's Brief in Opposition

1. Implementation and Discretion

Conversely, in his response, Mr. Saada argued that certiorari was not necessary in this case, nor was it needed for direction regarding undertakings, as the text of the Convention permits judicial discretion even following a grave risk finding.[70] He further argued that not only was the court's discretion central to a grave risk and subsequent return analysis, but that the split in the circuit courts' analysis of the Convention was not a concern regarding the implementation of the Convention.[71]

65. *Id.* at 20.

66. *Id.*

67. *Id.* at 23–24 (citations omitted).

68. *Id.* at 19–20.

69. *Id.* at 22 (internal citation omitted).

70. *See* Opposition, *supra* note 56, at 11–12 (quoting Article 13(b) text stating that "the judicial or administrative authority of the requested State is *not bound* to order the return of the child if . . . there is a grave risk that his or her return would expose the child to physical or psychological harm") (emphasis in Opposition).

71. *Id.* at 13–15.

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

He also cited a U.S. State Department analysis that stated that "a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory."[72] Furthermore, "[t]he courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies."[73] Mr. Saada argued that because the court acted within its discretion, granting review would not change the outcome.[74]

2. Safe Harbor Orders

Mr. Saada also discussed "safe harbor" orders in the country of habitual residence as an ameliorative measure.[75] Safe harbor orders are generally secured from the court of habitual residence and set forth safeguards that permit an order of return.[76] As these orders are issued by the habitual residence court, that court would have jurisdiction to enforce its own orders, alleviating the concerns about enforceability.[77]

3. Comity and Examples of Sister Signatories

Mr. Saada also argued that requiring consideration of ameliorative measures promoted international comity between signatory states.[78] He cited the Hague Conference explanatory report stating that:

> [T]he practical application of this principle requires that the signatory States be convinced that they belong . . . to the same legal community within which the authorities of each State acknowledge that the authorities of one of them—those of the child's habitual residence[—] are in principle best placed to decide upon questions of custody and access.[79]

The cited Explanatory Report further stated that "substituting the forum chosen by the abductor for that of the child's residence would lead to the

72. *Id.* at 12 (quoting U.S. Dep't of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986)).

73. *Id.* (quoting U.S. State Dep't Text & Legal Analysis, 51 Fed. Reg. at 10,509).

74. *Id.* at 1.

75. *Id.* at 17–19.

76. *Id.* at 19.

77. *Id.* at 17–19.

78. *Id.* at 22.

79. *Id.* at 23 (quoting Elisa Pérez-Vera, Explanatory Report, *in* 3 Acts and Documents of the Fourteenth Session of the Hague Conference on Private International Law 426, 434–35 ¶ 34 (1982)).

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration."[80]

Mr. Saada ultimately implored the Court to deny the petition and allow district courts to utilize their discretion in the consideration of ameliorative measures in grave risk cases, while arguing that consideration of "all available remedies" should be required.[81]

IV. Analysis of the Different Approaches and Split in the Circuits

Both parties acknowledged a split in the circuits regarding the issuance of ameliorative measures, although they disagreed as to the scope or significance of the split.[82] Ms. Golan emphasized that the First, Eighth, and Eleventh Circuits had indicated that courts "need not consider any ameliorative measures" once a grave risk of harm had been proven.[83] However, the Second, Third, and Ninth Circuits had indicated the opposite, that a court must take into account any ameliorative measures that could be taken by the parents and authorities.[84]

The Sixth and Seventh Circuits had essentially held that it was within the court's discretion to consider ameliorative measures, but "cautioned against the use of ameliorative measures in cases involving domestic abuse and suggested that consideration of ameliorative measures is inappropriate in such cases."[85] The Sixth Circuit in *Simcox v. Simcox* went as far as to provide a three-tier approach in cases of domestic violence, which shall be discussed in detail below.[86] The Seventh Circuit in *Van De Sande v. Van De Sande* noted that the safety of the children is "paramount" and indicated that it was "less appropriate" for courts to consider undertakings where there was "unequivocal evidence" of abuse.[87]

The Supreme Court described the different approaches as follows:

80. *Id.* (quoting Pérez-Vera, *supra* note 79, at 435 ¶ 34).

81. *Id.* at 28.

82. *See* Petition, *supra* note 55; Opposition, *supra* note 56, at 1 ("The circuit split discussed by the Petitioner amounts to a distinction without a significant difference."). State courts were also divided. Petition, *supra* note 55, at 17–18.

83. *See* Petition, *supra* note 55, at 11.

84. *See id.* at 13 (stating that "the Second, Third, and Ninth Circuits require a district court to consider a full range of ameliorative measures that would permit return of the child, even when the court finds that there is a grave risk that a child's return would expose that child to physical or psychological harm").

85. *Id.* at 14–15.

86. *See id.* at 15–16 (discussing Simcox v. Simcox, 522 F.3d 594 (6th Cir. 2007)); *see also infra* Part IV.C.

87. 431 F.3d 567, 572 (7th Cir. 2005) (citation omitted).

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

> This Court granted certiorari to decide whether the Second Circuit properly required the District Court, after making a grave risk finding, to examine a full range of possible ameliorative measures before reaching a decision as to whether to deny return, and to resolve a division in the lower courts regarding whether ameliorative measures must be considered after a grave risk finding. [footnote citation: Compare *In re Adan*, 437 F.3d 381, 395 (C.A.3 2006) (requiring consideration of ameliorative measures); *Gaudin v. Remis*, 415 F.3d 1028, 1035 (C.A.9 2005) (same); *Blondin II*, 238 F.3d 153, 163, n. 11 (C.A.2 2001) (same), with *Acosta v. Acosta*, 725 F.3d 868, 877 (C.A.8 2013) (consideration not required in all circumstances); *Baran v. Beaty*, 526 F.3d 1340, 1346–1352 (C.A.11 2008) (same); *Danaipour v. McLarey*, 386 F.3d 289, 303 (C.A.1 2004) (same).][88]

A. Courts That Denied Return Based on Grave Risk Alone

In *Danaipour v. McLarey,* the First Circuit found that the evidence supported the fact that the father had sexually abused one of the children and that the return of both children to the habitual residence of Sweden would cause the children psychological harm, regardless of any possible ameliorative measures to protect the children from their father.[89] As such, the court stated that it was not required to consider any further remedies or protections the state of habitual residence had to offer before denying the return of the children.[90] In *Walsh v. Walsh*, the First Circuit considered undertakings that had been ordered by the district court but found that the father's violent conduct and history of repeatedly violating orders in the United States and Ireland demonstrated that the undertakings would not protect the children upon their return.[91]

The Eighth Circuit, in the case of *Acosta v. Acosta*, affirmed the district court's decision to deny the return of the children to the father in Peru, where the mother had proved that there would be a grave risk of physical and psychological harm to the children.[92] The court found it was within the district court's discretion to deny return without consideration of ameliorative measures and cited to other courts also reluctant to consider

88. Golan v. Saada, 142 S. Ct. 1880, 1891 & n.6 (2022).

89. 386 F.3d 289, 301–03 (1st Cir. 2004); *see also* Diaz-Alarcon v. Flandez-Marcel, 944 F.3d 303, 314 (1st Cir. 2019).

90. *Danaipour*, 386 F.3d at 303.

91. 221 F.3d 204, 220–22 (1st Cir. 2000).

92. 725 F.3d 868, 875–77 (8th Cir. 2013).

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

these measures where a parent is violent, rejecting the notion that the existence of social service agencies in the habitual residence was sufficient to guarantee the child's and the mother's safety.[93]

In *Baran v. Beaty*, the Eleventh Circuit affirmed the denial of return of the children to Australia, where there was evidence of domestic violence, no "specific proposal for appropriate undertakings" was presented at the evidentiary hearing, and the trial court determined "any proposed undertakings would be inappropriate given the nature of the case."[94]

B. Courts That Required Consideration of Ameliorative Measures

Conversely, other courts had determined that following a grave risk finding, alternative remedies that would allow for the safe return of the child must be considered before return is denied.[95] For instance, in *Valles Rubio v. Veintimilla Castro*, the Second Circuit determined that "ameliorative measures such as litigation in Ecuadorian courts" and specific terms agreed to by the parties were sufficient to protect the child, and ordered the child's return.[96] In *Blondin v. Dubois*, while the Second Circuit ultimately denied the return of the children, the court first required consideration of the available arrangements and other remedies that could allow for the return of the children to their habitual residence of France.[97] Further, in *Turner v. Frowein*, the Connecticut Supreme Court, following *Blondin* and other cases, found that while the evidence supported a finding of grave risk due to the father's sexual abuse of the child, the trial court erred in failing to conduct a full

93. *Id.* at 877; *see also* Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995) (rejecting father's argument that the Article 13(b) "intolerable situation" exception is only applicable if the government and court of the country of habitual residence, in this case, Mexico, are "unable to protect the child" upon return).

94. 526 F.3d 1340, 1352 (11th Cir. 2008).

95. Blondin v. Dubois, 189 F.3d 240, 248–50 (2d Cir. 1999) [*Blondin I*]; Blondin v. Dubois, 238 F.3d 153, 156, 158–163 (2d Cir. 2001) [*Blondin II*]; Turner v. Frowein, 752 A.2d 955, 960–69 (Conn. 2000).

96. 813 F. App'x 619, 621–23 (2d Cir. 2020).

97. *Blondin I*, 189 F.3d at 248–50; *Blondin II*, 238 F.3d at 156, 158–164. While the court in *Blondin I* found that the district court was required to consider potential ameliorative measures for the children to be safely returned to France, in *Blondin II* the court affirmed the district court's determination (supported by expert testimony) that "as France was the scene of their trauma," return "under *any* circumstances would cause them psychological harm," and thus return was denied. *Blondin II*, 238 F.3d at 157, 163; *see also* Elyashiv v. Elyashiv, 353 F. Supp. 2d 394, 408–09 (E.D.N.Y. 2005) (denying return petition where the court found that the father might refuse to comply with any possible orders entered in Israel to protect the children from abuse, and returning to the home country would likely trigger the children's post-traumatic stress disorder); Jacquety v. Baptista, 538 F. Supp. 3d 325, 337, 381 (S.D.N.Y. 2021); Reyes Olguin v. Cruz Santana, No. 03 CV 6299 JG, 2005 WL 67094, at *7–8, 12 (E.D.N.Y. Jan. 13, 2005).

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

evaluation of placement options and legal safeguards that would protect the child upon return to the Netherlands for the custody proceedings.[98]

The Third Circuit similarly ruled in *In re Application of Adan* that courts *must* take into account ameliorative measures.[99] Likewise, the Ninth Circuit in *Gaudin v. Remis* reversed the district court's decision without reaching a determination on the question of grave risk of psychological harm because the trial court failed to consider "alternative remedies" to safely return the children.[100]

C. Simcox Framework

The court in *Simcox v. Simcox* created three categories for determining whether undertakings were sufficient to order the return of the child in cases of abuse.[101] First, the court noted that cases of "relatively minor" abuse would likely not rise to the level of "grave risk" as required by Article 13(b), and undertakings were therefore "largely irrelevant. . . ."[102] Second, for "cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect," undertakings would "likely be insufficient to ameliorate the risk of harm, given the difficulty of enforcement and the likelihood that a serially abusive petitioner [would] not be deterred by a foreign court's orders."[103] The third category captured all cases of grave risk that fall in the middle; the grave risk determination in these cases involved "a fact-intensive inquiry that depends on careful consideration of several factors, including the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child caused by its return."[104] The court found that even in this "middle" category, undertakings should only be adopted "where the court satisfies itself that the parties are likely to obey them."[105]

98. 752 A.2d 955, 960, 969, 974, 976–77 (Conn. 2000). The court found that "before a trial court may properly deny a petition under article 13b, it must evaluate the full range of placement options and legal safeguards that might facilitate the child's repatriation under conditions that would ensure his or her safety, thereby preserving the home country's jurisdiction over the underlying custody dispute without endangering the child." *Id.* at 969.

99. *See* 437 F.3d 381, 395, 398–99 (3d Cir. 2006).

100. *See* 415 F.3d 1028, 1035, 1037–38 (9th Cir. 2005).

101. 511 F.3d 594, 607 (6th Cir. 2007).

102. *Id.*

103. *Id.* at 607–08.

104. *Id.* at 608.

105. *Id.*

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

V. Supreme Court Decision

Against this background of a split in the circuits and inconsistency in state courts, the U.S. Supreme Court unanimously held in *Golan v. Saada* that while courts have discretion to consider ameliorative measures when ordering or denying the return, the court may decline to consider these measures "where it is clear that they would not work because the risk is so grave" or where the court "reasonably expects" the parent will not comply.[106] The Court rejected Mr. Saada's position that the consideration of ameliorative measures was "implicit" to the requirement that the court determine "whether a grave risk of harm exists."[107] The Court stated while there may be "overlap" between the inquiry of whether grave risk exists and consideration of ameliorative measures to protect the child from harm, they are not the same question: "The question whether there is a grave risk . . . is separate from the question whether there are ameliorative measures that could mitigate that risk."[108]

The Court concluded that the Second Circuit erred in elevating the court's discretion to consider ameliorative measures to a mandate, and remanded the case to the district court for application of the correct legal standard.[109] The Court noted, "[t]he fact that a court may consider ameliorative measures concurrent with the grave risk determination . . . does not mean that the Convention imposes a categorical requirement on a court to consider any or all ameliorative measures before denying return once it finds that a grave risk exists."[110]

On the contrary, the Court found that the Convention "constrain[s] courts' discretion to consider ameliorative measures in at least three ways."[111] First, any consideration of ameliorative measures must be in accordance with the purposes and objectives of the Convention and "prioritize the child's physical and psychological safety," which "may overcome the return remedy."[112]

Further, Justice Sotomayor's unanimous opinion emphasized that courts must steer clear of making custody determinations and ensure that any ameliorative measures are "limit[ed] . . . in time and scope" to facilitating the "safe return" of the child.[113] The scope should be limited in order to "abide

---

106. 142 S. Ct. 1880, 1894 (2022).
107. *Id.* at 1892.
108. *Id.*
109. *Id.* at 1888, 1895.
110. *Id.* at 1892.
111. *Id.* at 1893.
112. *Id.* (citation omitted).
113. *Id.* at 1894.

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute."[114]

Finally, the Court found that the Convention requires an expeditious result, and delay is a detriment.[115] Therefore, "[c]onsideration of ameliorative measures should not cause undue delay in resolution of return petitions."[116]

The Court concluded:

> To summarize, although nothing in the Convention prohibits a district court from considering ameliorative measures, and such consideration often may be appropriate, a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. The court may also find the grave risk so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate. Ultimately, a district court must exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention.[117]

The Court vacated the Second Circuit decision and remanded the case for the district court to apply "the correct legal standard" and to "determine whether the measures in question are adequate to order return in light of its factual findings concerning the risk to [the child], bearing in mind that the Convention sets as a primary goal the safety of the child."[118]

VI. Subsequent Events

Upon remand, the trial court reviewed the matter pursuant to the standards outlined in the Supreme Court ruling and determined that "under the circumstances of this case, it [was] appropriate to consider, as a matter of discretion, whether the existence of ameliorative measures . . . ma[d]e it possible for B.A.S. to return safely to Italy."[119] This review ultimately did

114. *Id.*
115. *Id.* at 1894–95.
116. *Id.* at 1895.
117. *Id.*
118. *Id.* at 1895–96.
119. Saada v. Golan, No. 1:18-CV-5292, 2022 WL 4115032, at *1 (Aug. 31, 2022), *vacated and remanded sub nom. In re* B.A.S., No. 22-1966, 2022 WL 16936205 (2d Cir. Nov. 10, 2022).

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

not change the trial court's decision, and on August 31, 2022, the court again granted Mr. Saada's petition and ordered the return of the child to Italy.[120]

In the trial court's decision, the court discussed the "robust measures" taken by the Italian courts to ensure the minor child's safety.[121] The trial court also reaffirmed its view that the Italian courts were entitled to comity, which served the overarching purpose of the Convention.[122] Additionally, the trial court noted that the domestic abuse was directed at Ms. Golan and not the minor child.[123]

Ms. Golan again appealed the trial court's decision.[124] It is profoundly sad that on October 18, 2022, Ms. Golan was found dead in her apartment in New York City.[125] After her death, the Second Circuit dismissed Ms. Golan's appeal as moot due to her passing, vacated the district court's order, and remanded the case for further proceedings.[126] The Second Circuit instructed that "[o]n remand, in the first instance, the District Court should entertain any motions for intervention or substitution of parties."[127]

Conclusion

The overarching purpose of the Hague Convention is to protect the well-being of children, which is generally done when the court of the child's habitual residence makes substantive custody decisions. The Convention preamble states "that the interests of children are of paramount importance in matters relating to their custody."[128] The Convention seeks to prevent disruption to children's lives, forum shopping, and child abduction. While the general and overarching principle is that the interests of children are served when the court of the child's habitual residence decides the merits of custody proceedings, the Convention also recognizes that the physical, social, emotional, and mental safety of a child may not always be served by return. Abuse by a parent causes damage to a child. In the absence of explicit text, courts have attempted to balance the goal of returning the child to their habitual residence with the need to protect the child. In a way,

120. *Id.*

121. *Id.* at *6.

122. *Id.* at *8–9; *see also* Navani v. Shahani, 496 F.3d 1121, 1128–29 (10th Cir. 2007) ("The Hague Convention rests implicitly upon the principle that any debate on the merits of . . . custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal.") (quoted in *Saada*, 2022 WL 4115032, at *8).

123. *Saada*, 2022 WL 4115032, at *5.

124. *See In re* B.A.S., No. 22-1966, 2022 WL 16936205 (Nov. 10, 2022).

125. *See* McShane, *supra* note 3.

126. *In re B.A.S.*, 2022 WL 16936205, at *1.

127. *Id.*

128. Convention, *supra* note 1, pmbl.

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

these attempts are also adaptations to the reality of abductions in instances of domestic abuse.

It is relevant to note that there have been changes concerning the most common circumstances for abductions since the time when the Convention was drafted:

> The aim of the [Convention] was to protect the child from a change of environment, the rupture of its caring parent, the change of the native tongue and new cultural conditions and relatives. This implies that the abductor is not the caring parent, the country and relatives are strange or unknown to the child, and the environment is new.
>
> Indeed, at the time of drafting the [Convention], the abducting parent used to be the father (non-custodial parent). However, according to the statistics available on the website of the Hague Conference, nowadays, the large majority (80 percent) of abducting parents are the primary carers, or the "joint primary carer" of the child. Where the taking person is the mother, this figure increases to 91 percent. Mothers were the abducting parents in 73 percent of all cases. In total 58 percent of taking persons travelled to a state of which they were nationals.[129]

Essentially, while there was a premise that child abduction would be most commonly perpetrated by fathers, in fact it is mothers who are still more often the primary caregivers who more frequently resort to child abduction or retention. Moreover, "[a]lthough there are no comprehensive statistics on how many 1980 Convention cases involve allegations or findings of domestic violence, empirical research has confirmed that this phenomenon frequently plays a role in parental child abduction cases and may be present in about 70 percent of parental child abduction cases."[130] Ultimately, the Supreme Court has made it clear that the court has discretion in deciding whether to order return of a child subject to ameliorative measures after determining that the return presents a grave risk of harm. However, the *Golan* decision also appears to suggest a conservative approach to these

129. Adriana De Ruiter, 40 Years of the Hague Convention on Child Abduction: Legal and Societal Changes in the Rights of a Child 7–8 (Pol'y Dep't for Citizens' Rts. & Const. Affs., Directorate-Gen. for Internal Policies 2020), https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/660559/IPOL_IDA(2020)660559_EN.pdf.

130. Katarina Trimmings & Onyója Momoh, *Intersection Between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings*, 35 Int'l J.L., Pol'y & Fam. 1, 2 n.2 (2021).

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

ameliorative measures, limiting them in scope and nature, especially in instances where there has been a proven history of domestic abuse.

Published in *Family Law Quarterly*, Volume 56, Numbers 2 & 3, 2022–2023. © 2023 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.