No. 20-1034

In the Supreme Court of the United States

NARKIS ALIZA GOLAN,
Petitioner,
v.
ISACCO JACKY SAADA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether a court, determining an action under the Hague Convention, that made a finding under Article 13b of grave risk of physical or psychological harm, can deny an order of return without considering protective measures which would enable the implementation of the mandate to return children wrongfully removed or retained.

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INTEREST OF THE IAFL[1]

The International Academy of Family Lawyers (hereinafter: the IAFL), was formed in 1986 to improve the practice of law and the administration of justice in the area of divorce and family law throughout the world. The IAFL is a worldwide association of practicing lawyers, currently numbering over 810 Fellows in 57 countries, each of whom is recognized by the bench and bar in his or her country as an experienced and skilled family law practitioner.

IAFL Fellows have made presentations in the United States and other countries in relation to legal reforms concerning family related matters, including the Hague Convention, Civil Aspects of International Child Abduction, (Hereinafter: The Hague Convention). It has sent representatives to participate in relevant international conferences, including the seven Special Commissions on the Implementation of The Hague Convention on the Civil Aspects of International Child Abduction held every four years in The Hague. IAFL Fellows have also written and lectured widely on the Abduction Convention and related topics, such as the relocation of children across state borders.

The IAFL filed an amicus curiae brief in *Lozano v. Montoya*, 134 S. Ct. 1224 (2014), 572 U.S. _____ (2014) in *Cahue v. Martinez*, 137 S. Ct. 13 (2016), and in

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amicus* certify that no counsel for a party authored any part of this brief and no person or entity other than counsel for the *amicus* have made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

Monasky v. Taglieri, 140 S. Ct. 719 (2020). It has also filed a brief in the U.S. Court of Appeals for the Eleventh Circuit, *Calixto v. Lesmes,* 909 F.3d 1079 (2018). Additionally, briefs have been filed by the organization in the Supreme Court of the United Kingdom, *In the Matter of AR, (Children) (Scotland)* UKSC 2015/0048 and France, *Bowie v. Gaslain* (No. T 15-26.664).

The IAFL's interest in the instant case relates to its concern that implementation of the Abduction Convention, which is an effective means for both deterring child abductions and enabling the prompt return of children unlawfully removed from their habitual residence, will be severely undermined if the judgment of the Second Circuit is overturned. Many child abduction cases are brought to court in signatory States by IAFL Fellows. The IAFL has a significant professional and policy interest in preserving the deterrent effect of the Abduction Convention and ensuring the prompt return of wrongfully removed or returned children to their habitual residence.

The IAFL is acting pro bono in submitting this brief.

STATEMENT OF THE FACTS

The International Academy of Family Lawyers adopts the facts as they are stated in the Respondent's brief.

SUMMARY OF THE ARGUMENT

The first of the two stated objects of the Hague Convention is "a: to establish procedures for the prompt return of children wrongfully removed to or retained in

any Contracting State; ….". The Hague Convention, while outlining the conditions of those procedures, does not establish hard and fast rules as to their nature. Each contracting State has adopted its own set of regulations to implement the Hague Convention. The United States implementing legislation of the Hague Convention is the International Child Abduction Remedies Act ((ICARA), 22 U.S.C. sec. 9001). Issues not resolved by ICARA have been determined by the courts. It has been held, for instance, that there is no right to a jury trial in a Hague Convention procedure, (*see Silverman v. Silverman*, 312 F.3d 914, overturned en banc, 338 F. 3d 886, 8th Cir. 2003). Furthermore, member States have adopted different procedures regarding presentation of oral evidence, on which the Convention is silent. As an example, proceedings in the United States include the examination of parties and witnesses while proceedings in the United Kingdom are generally determined based on written submissions alone. "Hague Convention proceedings were summary and oral evidence was not ordinarily adduced", *(Re C (A Child) (Child Abduction: Parent's Refusal to Return with Child) [2021], EWCA Civ. 1216*. These and other procedural matters are not referred to in the Convention.

The Hague Convention calls for the States to act expeditiously when determining a petition for the return of a minor child and refers to a non- binding period of six weeks to determine the outcome of the legal proceedings (Article 11 of the Convention). At least one contracting State, Israel, has adopted implementing regulations that make the 6 week period mandatory for the conclusion of legal proceedings in

the first instance, while other States use it as a non-binding point of reference. (*See Regulation 110a, Regulations of the Family Court (Procedural Rules) 5781-2020, Israel)*.

Although the Hague Convention makes no specific reference to protective measures, the courts in various contracting States, including the US, have adopted what was initially referred to as "safe harbor" provisions. These provisions, primarily monetary in nature, were imposed by courts in circumstances where a return order was made but the abducting parent lacked the resources to provide housing and maintenance during the initial transitional period. As the defenses raised under Article 13b became more expansive, so did the response of the courts. In order to provide assurances which would alleviate the concerns raised under Article 13b, undertakings were imposed which extended beyond temporary financial arrangements and provided for legal assurances that safe-guarded the well-being of the returning children in their initial return to their habitual residence. Such undertakings often include guarantees against criminal prosecution of the abducting parent, vacating any temporary parenting orders in favor of the left behind parent which were issued post abduction and orders of protection. (see: *The 1980 Hague Convention on The Civil Aspects of International Child Abduction- A Guide for Judges, Judge James D. Garbolino, Federal Judicial Center, March, 2016, Undertakings, p.98*)

Courts have used various methods to ensure that the undertakings will be respected. In some cases a letter by the local district attorney guaranteeing that

criminal charges would not be filed against the abducting parent had to be submitted before the return could be implemented. In other cases, such as in the present matter, monetary guarantees or cash deposits had to be executed. Additional undertakings might include a joint application by the parties for an emergency hearing before the competent court in the State of habitual residence prior to the departure date in order to ensure swift judicial action upon the children's return.

The most effective way to ensure that those undertakings which are to be implemented after the children's return will be enforced by the requesting State is by executing a mirror order. A mirror order can be obtained in common law jurisdictions with relative ease and swiftness in the requesting State without causing delay or incurring burdensome legal fees. A simple application by consent for domesticating a foreign order, along with a translation into the appropriate language where necessary, will generally result in the issuance of a mirror order within two to three weeks of application. As the courts of first instance, when issuing an order of return, routinely grant stays of execution in order to allow for the filing of an appeal, mirror orders are not, in fact, a cause for delay.

Furthermore, compared to the financial burdens imposed by some courts as part of the undertakings, in the present case a deposit $150,000., the costs involved in obtaining a mirror order are inconsequential.

In civil law jurisdictions, such as France and Germany, courts will rely on the affirmation of the

Central Authority of the requesting State to provide assurances regarding the enforcement of undertakings instead of mirror orders.

The Hague Convention is unique in that the governments of the contracting States are not the implementing authority but rather the judicial systems of those States. The Hague Convention's objectives can only be met if the courts of the contracting States cooperate in implementing the stated aims of the Convention. While recognizing that there may be differences in the legal systems and social services existing in the various contracting States, each State must recognize the competence of the other member States to implement the provisions of the Hague Convention. Failure to do so will turn the Hague Convention into a parochial instrument in which the courts of each contracting State measure its judicial system against those of the other States.

Undertakings per se are not mentioned in the body of the Hague Convention. That is not to say that they have not become a necessary instrument in certain circumstances in order to carry out the Convention objectives. The International Hague Network of Judges is also not mentioned in the body of the Hague Convention but was established subsequently to its ratification and today consists of 148 judges in 88 States providing assistance to judges determining proceedings under the Hague Convention.

The Network is particularly useful in the drafting of undertakings and their implementation in the requesting State. The Network of Judges publishes a Judges Newsletter which wrote about undertakings as

follows: "Safe harbour orders come in all shapes and sizes. They are frequently conditions to return. An example is the important, but often overlooked, urgent measure whereby both parents are restrained from causing, permitting or suffering the child who has been returned to the State of habitual residence under the 1980 Child Abduction Convention to be further removed from the home State until a court of competent jurisdiction in that State makes orders enabling the parents (or one of them) to travel internationally with the child. Having regard for the procedure to render an urgent measure enforceable in another Contracting State, the subject matter and enforceability of urgent measures cannot be an afterthought for the judge or the parties. The potential necessity for urgent measures should be considered from the outset." *(4J Judges Newsletter, Vol. XXIV, Summer-Fall, 2019).*

ARGUMENT

The primary objective of the Hague Convention is to promptly return minor children who are unlawfully removed or retained in a State other than their State of habitual residence. To argue that courts should not be obligated to consider measures which would enable them to fulfill the Convention goals is to deliberately undermine those goals. The issue of enforceability of such measures is for each individual court to determine according to the circumstances of the case. Whether there are appropriate ameliorative measures in a particular case is a practical, not a principled, consideration. A court which fails to consider such measures would be remiss in its duties to carry out the

goals of the Hague Convention, thus undermining the commitment of the United States when it ratified the Convention.

To argue against the obligation to consider protective measures is to assume one of two positions: That no protective measures can ever be effective; or that even if such measures may be effective, the preferred option is to permit the wrongful removal or retention of a child. Neither of those positions should be adopted by this Court.

The U.S. Supreme Court has expressed the need to take into account the views of the other contracting States.

> "The court's view is also substantially informed by the views of sister contracting states on the issue, *see El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176, particularly because the ICARA directs that "uniform international interpretation" of the Convention is part of its framework, see sec. 11601(b)(3)(B). While the Supreme Court of Canada, has reached an arguably contrary view, and French courts are divided, a review of the international law confirms that courts and other legal authorities in England, Israel, Austria, South Africa, Germany, Australia, and Scotland have accepted the rule that ne exeat rights are rights of custody within the Convention's meaning." *Abbott v. Abbott*, 560 U.S. 1, 3 (2010).

The underlying assumption of the member States is that each jurisdiction respects the ability of the other

contracting States to carry out the directives of the Hague Convention. It also is inherent to the functioning of the Convention that each State relies on the judicial and support systems of the other contracting States to adequately determine the best interests of the minor children in their jurisdiction and to provide for the welfare of their parents.

The 6th Circuit Court of Appeals commented on the need to rely on the legal systems of contracting States:

> "When we trust the court system in the abducted from country, the vast majority of claims of harm-those that do not rise to the level of gravity required by the Convention – evaporate." *(Friedrich v. Friedrich*, 78 F. 3d 1060, 6th Cir. 1068, 1996)

A party who argues against that assumption must carry the burden of proof to prove otherwise.

> " In this context, the court is entitled and bound to take the view in the absence evidence to the contrary that the courts of New Zealand can make appropriate protective orders, extending if necessary to a full prohibition of any form of contact or entering the area where the family live, and can effectively punish any non-compliance. Should the mother in this case adduce proper evidence before implementation takes place which explains to the satisfaction of the court that, contrary to the basis on which I proceed, the protection of the courts in New Zealand does not afford either in practice or theory adequate protection from MH to the

> children to be returned or to herself (assuming she continues to be their primary carer) then I would consider that this court has adequate jurisdiction to entertain an application for the review of the order of return."
> *T.B. v J.B. (Abduction: Grave Risk of Harm) 2001 2 FLR 515, Court of Appeal (Civil Div.) Dec. 2000, England.*

The decision as to whether or not undertakings are appropriate in a specific matter and the nature of those undertakings is clearly within the discretion of each court. By not considering the possibility of undertakings, a court is summarily dismissing the possibility that the requesting State is capable or willing to enforce protective measures upon the minor's return. Such a position would leave the court in each case to make a determination based not on the specifics of the particular case but rather on the court's general assessment of the legal system of a member State. That is a formula which will undermine the uniform implementation of the Hague Convention and endanger future cooperation between the respective courts and State authorities.

> "Too much should not, in my view, be made of the difficulty of enforcing such undertakings. Such problems are inherent in cases involving foreign jurisdictions but they cannot be allowed to undo the strong initiatives of the international community reflected in the achievement of the Convention. Undertakings are now a common feature of such cases. There is no mention in the casebooks that I could find

> of practical difficulties that have arisen in conforming to such undertakings. This court need not be concerned about such problems where they are not shown to exist. At least we should not pass upon them in the absence of a clear challenge on the record either to the power to exact undertakings generally or to obtain them in the form required."
> *DP v Commissioner [2001] HCA 39 June 2001, Australia.*

The *Federal Circuit and Family Court of Australia Rules, 2021* specify the relatively simple procedure for the registration of a foreign order. A certified copy of the overseas order and a certificate signed by an office of the overseas court stating that the order is enforceable in that jurisdiction is sent to the Secretary of the Attorney General's office. The Secretary then sends those documents to a Registrar of the Federal Circuit and Family Court who has the power to file the order, making it enforceable throughout Australia.

Under Schedule 4, Part 38.4 of the above Rules, a Judicial Registrar has the authority to register an overseas child protective order received other than from the Secretary of the Attorney General's Department.

The Court of Appeals in England has held that the failure of the trial court to consider ameliorative measures after finding that a defense had been made under Art. 13b was reversable error. In remanding the case for further determination, the appellate court found error in the lower court judge's reasoning; "The failure by the judge to address the nature of the risk of

domestic violence occurring in the future and to answer why that would not be sufficiently ameliorated by the measures proposed by the father are, in my view, fundamental gaps in the reasoning which cannot be filled by this court." *Re C (Children) (Abduction: Article 13b), [2018] EWCA Civ. 2834, par. 501q*.

The Hague Conference on Private International Law published a *Guide to Good Practice* regarding the implementation of various issues arising under the Convention. The *Guide* to Good Practice is expanded time to time as it addresses various issues arising under the Abduction Convention. The Guide is issued by committees consisting of representatives of member States specifically appointed by the Permanent Bureau of the Hague Conference on Private International Law due to their expertise in the implementation of the Hague Convention. In 2020, the *Guide* issued its recommendations regarding Article 13b, *Guide to Good Practice; Part IV, Art. 13b*, stating that courts need to consider protective measures where there is evidence of grave risk upon return to the habitual residence.

While the Guide's recommendations are not binding, they certainly reflect the preferred approach to the implementation of the Hague Convention by the experts of the member States. The recommendations which it contains are relied upon by the courts in determining matters according to the Convention. The English Court of Appeals remanded a case to the trial court which had rejected the father's petition for return for failing to follow the *Guide*. It held that before dismissing the petition on grounds of grave risk, the court needed to consider "the availability of adequate

and effective measures of protection in the State of habitual residence" as set out in the *Guide to Good Practice. (Re C (A Child) (Abduction: Article 13(b) [2021] EWCA Civ. 1354*. Thus, the claim that the Convention does not contain any provisions for undertakings ignores the reality of the preferred approach to this issue which has been adopted by the member States.

Concern regarding the enforceability of ameliorative orders is easily and routinely resolved by making the return order conditional upon fulfillment of the protective measures. If the undertakings ordered by the court are not fulfilled, the return order is vacated. (*Van De Sande v. Van De Sande*, 431 F.3d 567 (7th Cir. 2005). The obligation to domesticate the undertakings by order in the requesting State has resulted in the use of mirror orders. Such orders are a catch-all description for the swift and simplified domestication of the undertakings as an order issued in the State of habitual residence. Once a mirror order is issued, all of the undertakings have the same effect as any other order issued by the court of the requesting State. In the event that they are violated after the return, the legal system of the requesting State can apply the same enforcement measures that it would to any other order which it issued.

Should the abducting parent undermine the implementation of the protective measures by failing to cooperate in obtaining a mirror order, the court can order the return without requiring the production of a mirror order. Under those conditions, mirror orders can be obtained quickly and with little cost. The time

involved generally varies from between one to three weeks, far less time than it takes to obtain an expert opinion concerning grave risk claims.

The claim that undertakings may be seen as an infringement of the jurisdiction of the requesting State should be rejected. The use of mirror orders is not limited to Hague Convention cases. They are often effectively used in matters involving the international relocation of children. Such orders in effect recognize the authority of the court of habitual residence to rule on custodial matters while facilitating the transition until the local court can deliberate on the case and issue orders.

In requiring undertakings, the court seized is merely seeking to ensure the short-term safety of the child. Such measures will persist only until the court in the State of the child's habitual residence is seized of the substantive custody proceedings. Undertakings are requested to ensure that both abductor and child are provided for upon their return. The undertakings were not designed to circumscribe or influence the requesting State. *(Re G. (A Minor) (Abduction) [1989] 2FLR 475, INCADAT no. 95).*

The creation of Central Authorities to implement the Convention in each contracting State provides a readily available resource to assist in providing information about the legal and administrative authorities in the requesting State. (See Chapter II, Articles 6 and 7 of the Convention). Amongst the duties of the Central Authorities are: "to provide information of a general character as to the law of their State in connection with the application of the Convention;

(Article 7(e) and "to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;" (Article 7(h). Central Authorities are regularly called upon to provide the court in the requested State with information regarding the laws of custody, orders of protection, the existence of support agencies and other information in the requesting State that would assist the court in drafting a return order.

The deliberations conducted by the delegates who drafted the Convention contemplated the obtaining of information from Central Authorities which would enable the decision making authority to adopt an intermediary position in doubtful cases. Preliminary document No. 6 of September, 1980, published in *Actes et documents de la Quartorzieme session, Tome III Child Abduction* at page 243, contains the comments of the United States delegation regarding preliminary Article 12. The United States proposed to add a new second paragraph to preliminary article 12:

> "When a court determines that substantial risk as described in b above may exist, it may refer the matter to the Central Authority of the State of origin and return the child to an appropriate person or public or private institution in that State."

The U.S. delegate explained their proposal as follows:

> "The new second paragraph of this proposed revision would enable the decision making body to adopt an intermediary position in doubtful

> cases. Ultimately the State of origin would decide whether the child is to be returned to the applicant or is to be placed with a third person or institution or to be returned to the alleged abductor."

The role of the Central Authority in supplying relevant information regarding the terms of the return order and the appropriate body with whom the child was to be placed was clearly considered by the drafters of the Convention. The development of undertakings by case law is therefore rooted in the deliberations of the Convention drafters.

CONCLUSION

The Hague Convention obligates contracting States to take appropriate measures to secure the prompt return of children wrongfully removed or retained in a State which is not his or her habitual residence. In order to implement said obligation where there is a finding of grave risk according to Article 13b, courts have made return orders contingent upon fulfilling certain undertakings. Such undertakings may be guaranteed by means of various mechanisms, including monetary deposits, mirror orders and the assurances of the Central Authority of the requested State.

The obligation to order the swift return of children wrongfully removed to or retained in a jurisdiction other than his or her habitual residence mandates that ameliorative measures be considered by courts before denying a petition for return. It is within the discretion of the courts to determine whether such measures are appropriate after they have been duly considered.

Given the different approaches of the Federal Circuits to the use and implementation of undertakings, this Court should adopt the approach which most conforms with the goals of the Hague Convention to deter the wrongful removal of children internationally and to implement their prompt return when wrongful removals have occurred. That is the approach taken by the Second Circuit in *Blondin v. Dubois (Blondin I)* (189 F.3d 240 (2nd Cir. 1999) and followed by the Third Circuit, (*In re Application of Adan*, 437 F.3d 381,3d Cir. 2006) and the Seventh Circuit, (*Van De Sande, ibid.*). This approach requires that where there is a finding of grave risk under Article 13b, the court must consider undertakings to overcome the possible grave risk of harm before denying a petition for return.

Respectfully submitted,

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