

For every right there is a corresponding duty.¹⁴⁷ Every basic right assumes three types of duties: a duty to avoid violating the right in question, a duty to protect from violation of the right, and a duty to aid those whose rights have been violated.¹⁴⁸ All of these duties have to be performed if the basic right is to be fully honoured. The right to physical security, to which abducting parents are also entitled, therefore has the following three correlative duties: duties not to eliminate a person's security (avoidance); duties to protect people against deprivation of security by others (protection); and duties to provide for the security of those unable to provide for their own (aid).¹⁴⁹

The consequences of violence on children are more dire because violence has the potential to cause children significant physical, mental, and emotional harm with long-term effects that can last into adulthood. Furthermore, violence against children erodes family structures, jeopardises children's education, generates social insecurity and consumes precious national resources.¹⁵⁰ Furthermore, the exposure of children to violence increases their risk of accrual of violent experiences, including later intimate partner violence.¹⁵¹

There are indications that women constitute the majority of domestic violence victims and according to a 2013 global review of available data, 35 per cent of women worldwide have experienced domestic violence/violence. Furthermore, national violence studies indicate that up to 70 per cent of women have experienced physical and/or sexual violence in their lifetime from their partners.¹⁵² Research also indicates that there is a great probability for further

¹⁴⁷Nickel J 'How human rights generate duties to protect and provide' (1993) 15 *Human Rights Quarterly* 77 at 86.

¹⁴⁸Shue H (1996) *Basic Rights: Subsistence, Affluence and Foreign Policy* 2 ed, 52.

¹⁴⁹Shue (1996) 52-53.

¹⁵⁰ The African Report on Violence Against Children. Addis Ababa: The African Child Policy Forum (ACPF) (2014) x. Available at www.africanchildforum.org (accessed 7 April 2015).

¹⁵¹Pinheiro P S, Independent expert for the United Nations Secretary-General's study on violence against children, World Report on Violence against Children (Geneva, 2006),p. 63-66. Available at www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf (accessed 7 April 2015).

¹⁵²World Health Organization, Global and Regional Estimates of Violence against Women, 2013. Available at

violence when the abused person (mainly women) takes measures to return after that person had fled across the borders for safety.¹⁵³ Furthermore, most abused women experience what is called “Battered Women’s Syndrome” and Post-Traumatic Stress Disorder (PTSD) which may affect their psychological well-being and compromise the credibility of their testimony in court.¹⁵⁴

A recent USA research report¹⁵⁵ found, among others, regarding domestic violence and the Hague Convention that:

- Prior to the abductions, the abducting mothers and their children were frequently subjected to brutal violence from the left-behind parents who lodged Hague Convention applications. Furthermore, those mothers who succeeded to keep their children in the USA were often faced with the challenge of continued threats or harassment from their ex partners.
- Mothers who have abducted their children to the USA were incapable of accessing supportive resources in the other country, so they left with their children to pursue safety and support of family members in the USA.
- The courts and relevant authorities in the USA were not amenable to mothers’ safety anxieties. For example, most women had their children returned to their habitual residence, and in most instances the children are returned to a life with violent husbands.
- Mothers and their children faced great adversities after a Hague Convention decision. For example, most of the women and/or their children who returned to their habitual residence were victims of renewed violence by the fathers on their return and most mothers stated that none of the court undertakings which were aimed at protecting them and/or their children were executed.

http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf(accessed 7 April 2015); UN Women, 2012, Violence against Women Prevalence Data: Surveys by Country

¹⁵³Artz L & Smythe D ‘Case attrition in rape cases: a comparative analysis’ (2007) 20 *SACJ* 158-181.

¹⁵⁴ Long G J ‘Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions, National District Attorneys Association, American Prosecutors Research Institute’ August 2007, pages 13-16. Available at http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf (accessed 7 April 2015).

¹⁵⁵Edleson JL, Lindhorst T, Mehrotra G et al (2010), pages vii –xii.

- Most women experienced challenges regarding payment of legal fees and legal representation in order to respond to Hague Convention applications. In some instances the left behind parents utilise intimidatory litigation.
- The Hague Convention decisions have not reflected on the research involving child exposure to domestic violence when deciding on grave risk for the past 20 years.
- There are indications that evidence of harm to children presented by legal representatives and through expert witness testimony was an important factor in cases where grave risk was found.
- The results of interviews with mothers and legal representatives and the analysis of Hague Convention rulings clearly indicate that there is a need for more awareness and training of legal representatives and judges in three areas: the meaning of the Hague Convention, including exceptions; the social science literature on the effects of children's exposure to domestic violence; and the experiences of mothers and children before they leave to the USA and then after Hague case decisions are made.

Considering the improvements that the USA has made in Hague Convention matters, it is highly probable that most of the above problems are experienced by abducting parents in the UK, Switzerland and RSA. The results of the above research clearly indicate that there are still a lot of challenges that need to be addressed with regard to Hague Convention domestic violence cases.

5. CONCLUSION

There is no doubt that violence against children affects their confidence in the adult world, more so in instances where this violence is exercised by the child's own parent, or by someone close to them. In view of the above international treaties, including the Hague Convention, ratified by the USA, UK, RSA and Switzerland and reflected in their domestic legislation, the aforementioned countries are compelled to ensure that there is full implementation of the law without any compromise. The dire situation brought about by the scourge of domestic violence requires that all loopholes which may allow domestic violence to thrive should be closed. The State has therefore a duty to create and implement the juridical framework for protecting children against all kinds of violence. Furthermore, States can work collaboratively towards universal prohibition of any violence against children by highlighting any injustice, danger and inhumanity of laws which provide children with less protection from interpersonal violence than adults.

6. ARTICLE 13 OF THE CONVENTION

6.1 Introduction

Article 13 of the Convention provides, among others, that:

"...the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

Apparently, Article 13 establishes three affirmative defences under the Hague Convention: The consent or acquiescence defence, which involves the left behind parent's consent to or acquiescence in the removal or retention of the child by the abducting parent; the grave risk defence, which arises in situations when the abducting parent asserts that returning the child would place the child at grave risk of physical or psychological harm or otherwise place the child in an intolerable situation; and the mature child's objection defence, which arises in situations when the child objects to being returned, and the court finds that the child has attained an age and degree of maturity at which it is appropriate to take the child's views into account.

It has been widely accepted that the Convention and its exceptions were created for the purposes of protecting the child and not the abducting parent. Therefore, an abducting mother cannot establish a defence under article 13(b) if the danger does not affect the child.

Consequently, grave risk can only exist when the return puts the child in imminent danger prior to the resolution of a custody dispute.¹⁵⁶ In most cases the grave risk defence has been narrowly interpreted and courts have consistently stated that there should be a narrow interpretation because to do otherwise, they hold, would undermine the Convention's policy goal of returning children who are wrongfully removed from their habitual residence.¹⁵⁷

It appears that in most instances abducting parents who allege domestic violence in Convention proceedings rely on Article 13(b), and therefore its interpretation is key in ensuring that there is a balancing of the rights of abducting parents, the children involved and the left-behind parents.¹⁵⁸

6.2 Burden of proof and evidentiary standard under Article 13

Concerning the issue of who is to bear the burden of proof under Article 13(b), the Convention text and Explanatory Report are clear that the burden rests on the abducting parent.¹⁵⁹ The abducting parent is obliged to prove the article 13(b) defence on a balance of probabilities.¹⁶⁰ However, some courts places victims at a disadvantage by creating an artificial two-prong test by requiring the abducting parent to show that there is a grave risk of psychological and physical harm but also that there are no mitigating measures that can be taken in the country of habitual residence to reduce that risk.¹⁶¹ While Article 13(b) explicitly

¹⁵⁶*Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996). INCADAT cite HC/E/USf82. See www.incadat.com (accessed 23 January 2016).

¹⁵⁷For example, in the USA case of *Dallemagne v Dallemagne* 44-0 F Supp 2nd 1283 (MD Fla (2006) 299, where the father had previously punched the children's mother until she was unconscious and had tried to run her over with a car. Nevertheless, the court did not find grave risk because "there was no credible evidence that the petitioner has ever physically harmed the children". See also *Simcox v. Simcox* 511 Supp 3d 594(6th Cir 2007) available at www.incadat.com (accessed 27 January 2016).

¹⁵⁸Quillen B (2014) 626.

¹⁵⁹Pérez-Vera Report, 76.

¹⁶⁰In the RSA case of *Penello v Penello* 2004 (3) SA 117 (SCA) 138D-F the court held that the words "grave risk" did not introduce an onus greater than that ordinarily applicable in civil proceedings.

¹⁶¹Quillen B (2014) 623 – 624.

requires the first prong, the second prong of the grave risk defence is not present in the language of the Convention.¹⁶² Professor Merle H. Weiner on the other hand explains it best: "This perspective reinforces the domestic[-]violence victim's view that legal solutions will not help her... It tells the batterer that the system will help him exercise power and control over his victim, ... The children are taught that violence is rewarded, and that the system does not care about their mother's plight."¹⁶³

6.3 Article 13(a) - Non-exercise of custody rights and/or Acquiescence or Consent

In terms of Article 13(a) of the Convention, the court is not bound to return a child to the place of habitual residence if the abducting parent can prove that the left behind parent was not actually exercising his or her rights of custody or had acquiesced or consented to the removal of the child. The aforementioned defences turn on the left behind parent's subjective intent, but they are distinctly different. The defence of consent relates to the left behind parent's conduct before the child's removal or retention, whereas the defence of acquiescence relates to "whether the left behind parent subsequently agreed to or accepted the removal or retention."¹⁶⁴

Left behind parents confronted with the defence of acquiescence face wide disparities in the requirements to rebut it. In the UK¹⁶⁵ some courts require that the consent be in writing, while

¹⁶²Quillen B (2014) 623 – 624; *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 001) INCADAT case: HC/E/USf 585. Available at www.incadat.com (accessed 27 January 2016). See also Sutherland C 'The Balancing Act of the Grave Risk of Harm Exception Under the Hague Convention of Civil Aspects of International Child Abuse - Ermini v. Vittori, 758 F.3d 2015 *Suffolk Transnational Law Review* 267 note 27. Available at <http://www.lexisnexis.com.ezproxy.uwc.ac.za> (accessed 6 November 2015).

¹⁶³Weiner M H 'International Child Abduction and the Escape from Domestic Violence' (2000) 69 *Fordham Law Review* 631.

¹⁶⁴Sweeney M B L & MacKenzie R 'Child Abduction: The Hague Convention On The Civil Aspects Of International Child Abduction: A Guide For New Hampshire Practitioners' 2013 *New Hampshire Bar Journal*, Spring/Summer, at para B.

¹⁶⁵The meaning of consent was considered in, among others, the English Court of Appeal decision of *Re P-J (Abduction: Habitual Residence): Consent* 5 - *Re P.-J. (Children)(Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588, [2010] 1

in the RSA, the consent needs to be for a permanent stay.¹⁶⁶ In Switzerland the consent could be express or tacit, but the left behind parent must clearly agree. In the USA¹⁶⁷ the courts require a subjective assessment of the intent of the left behind parent, and the nature and scope of the consent.¹⁶⁸

6.4 Application of Article 13(b) Exception - Grave Risk of Physical or Psychological Harm

According to the paragraph 34 of the Explanatory report¹⁶⁹ there should be a restrictive interpretation of the grave risk of harm defence, as well as of other defences, in order to ensure that there is no collapse of the entire structure of the Convention. Paragraph 34 states that:

“[T]he three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. [A] systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.”

The most commonly used exception in the Hague Convention is Article 13(b)¹⁷⁰ and it is the only relevant defence for the purposes of dealing with a parent who abducts the child to

W.L.R. 1237. INCADAT cite. HC/E/UKe1014. The court held that consent must be clear and unequivocal and can include future removal, provided that it is in force at the time of the removal and has not been withdrawn.

¹⁶⁶*Central Authority v Houwerts* 2008 (1) SA 49 (SCA); *Central Authority for the Republic of South Africa v Odionye Charles Iguwa* (10/15111) 27 August 2010 (Unreported). Available at www.justice.gov.za (last accessed 6 November 2015).

¹⁶⁷*Nicolson v Pappalardo*, 605 F.3d 100, 106 (2010).

¹⁶⁸*Brown-Williams* K B (2011) page 61.

¹⁶⁹Perez-Vera Report, para 34.

¹⁷⁰Lowe N ‘A Statistical Analysis of Applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction’ Part I (Global Reports) 2011, 29.

escape domestic violence.¹⁷¹ This defence is sometimes called the grave-risk defence. Neither "grave risk" nor "intolerable situation" are defined by the Convention and there are difficulties in defining "grave risk of harm" in Convention cases. As a result, there are myriad definitions of the terms. However, an application relating to the grave risk defence does not involve consideration of the merits of the custody issues. Furthermore, the three separate components to article 13(b) – physical harm, psychological harm and intolerable situation – can be used individually or collectively.¹⁷² Therefore, it appears that the drafters of the Convention envisioned that courts should interpret and develop the term. As a result, different courts in countries that ratified the Convention have interpreted Article 13(b) in different ways and in line with the laws and principles applicable in their countries.¹⁷³

In the USA case of *Friedrich v. Friedrich*¹⁷⁴ in describing the grave risk definition, the court indicated that grave risk of harm arises in situations where firstly, the return of the child places the child in imminent danger before the resolution of the custody dispute; secondly, where there is serious abuse or neglect, or extraordinary emotional dependence and when the court in the country of habitual residence may be incapable or reluctant to give the child adequate protection.

Apparently, courts frequently experience challenges in drawing a distinction between a "risk of harm" and a "grave risk of harm." However, the aforementioned distinction requires a subjective judgment by the courts. The courts may in this regard consider the probability of the threat of harm and also the nature of the possible harm to the child.¹⁷⁵

¹⁷¹Browne NL 'Note, Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction' 2011 *Duke Law Journal* 1196–97.

¹⁷²Beaumont P & McEleavy P 'The Hague Convention on International Child Abduction' Oxford University Press (1999) at page 139.

¹⁷³Weideman J and Robinson J A (2011) 75.

¹⁷⁴78 F.3d 1060, 1069 (6th Cir. 1996).

¹⁷⁵Townsend K 'Litigating International Child Abduction Cases under the Hague Convention Guide' (2012) at page 50. Available at www.missingkids.com/en.../HagueLitigationGuide/hague-litigation-guide.pdf (accessed 6 November 2015).

It appears that at the time when Article 13(b) of the Convention was drafted, the classic child abductor was thought to be a non-custodial father, and issues relating to domestic violence were insignificant, but only became salient during the early 1990's.¹⁷⁶

6.4.1 The UK approach regarding the grave risk defence

In the UK the "grave risk of harm" defence is normally raised by abducting parents, but rarely won. Even in instances of serious physical abuse, the UK courts are hesitant to deny the return of a child under the grave risk of harm defence, and will often rely on the implementation of "undertakings" that may be used to protect a child during his or her return to the place of habitual residence.¹⁷⁷

The decisions of UK courts indicate that the UK is interpreting the provisions of Article 13(b) of the Convention narrowly by requiring clear and convincing evidence.¹⁷⁸ In several English court decisions, there are indications that Article 13(b) defence was rejected or overturned on the basis that allowing such a defence would undermine the intention of the Convention.¹⁷⁹ The narrow interpretation and application of the grave risk defence in the UK has resulted in domestic violence victims who flee with their children to escape domestic violence experiencing complexities in invoking the Article 13(b) defence successfully.¹⁸⁰ The reason behind the UK's very narrow interpretation is owing to the fact that English courts are mainly

¹⁷⁶Quillen B (2014) 625; Weiner M H (2000) 611–14.

¹⁷⁷Sweeney M B L and MacKenzie R (2013) para C.

¹⁷⁸Bruch C 'The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Convention Cases' (2004) 38 *Family Law Quarterly* 532. In the case of *Re N (Abduction: Habitual Residence)* [2000] 2 FLR 899 an abducting mother argued that her children would face a grave risk of harm in that her husband was prone to domestic violence and had a history of alcohol abuse. However, the court rejected her argument and indicated that clear and convincing evidence was required. The reason advanced by the court was that the mother was still prepared to let her children have contact with their father, despite her allegations against him.

¹⁷⁹See, for example, *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 2 All ER 465; *Re W (Abduction: Domestic Violence)* [2004] EWHC 1247 (Fam); *Re A (A Minor) (Abduction)* [1988] 1 FLR 365.

¹⁸⁰Weideman J and Robinson J A (2011) Abstract.

concerned about adhering to the principles of the Convention and not only considering the best interests of children in general. Furthermore, the English courts presume that imposing undertakings will sufficiently ensure that children are protected from exposure to grave risk of harm.¹⁸¹ Furthermore, English courts assume that courts in the requesting State will ensure that any harm to the child is minimised or eliminated upon his or her return.¹⁸²

In *Re A (A Minor) (Abduction)*¹⁸³ it was held that exceptions in Article 13(b) are to be interpreted strictly, and physical or psychological harm must be proven by obvious, incontrovertible evidence. The grave risk of physical or psychological harm entails something more than an ordinary risk because the risk must not only be a trivial, but a substantial one.

In *Re W (Abduction: Domestic Violence)*¹⁸⁴ it was held that, as English law now stands, Article 13(b) has no realistic chance of ever being established unless there has been violence or other specific abuse to the child him or herself.¹⁸⁵ In this case there was an application by the father for the return of his child to the RSA. The child had unilaterally been removed by the mother from the family home in the RSA to UK. The mother alleged that her husband was physically, emotionally and sexually abusive towards her and raised three arguments supporting her unwillingness to return with the child to RSA. Firstly, it was argued that the child would be harmed by continued exposure to her father's behaviour towards her mother because this would affect her mother's ability to care for her. Secondly, it would damage the child psychologically and emotionally to see her mother under continual stress in circumstances where she was isolated and under continued threat of her father. In the third place it was argued that the father would attempt to deny the mother the ability to care for the child independently and sabotage any attempts by her to seek protection in the RSA courts.¹⁸⁶ The court held that domestic violence by a father to a mother is not in itself enough to trigger the Article 13(b) defence, there was no real evidence of grave distress of the child, the court ruled that the mother had not proven the Article 13(b) defence and ordered that the child be returned to the RSA.

¹⁸¹Weideman J and Robinson J A (2011) Abstract.

¹⁸²*C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 2 All ER 473.

¹⁸³[1988] 1 FLR 365.

¹⁸⁴[2004] EWHC 1247 (Fam).

¹⁸⁵*Re W (Abduction: Domestic Violence)* [2004] EWHC 1247 (Fam) 505 para 3(w).

¹⁸⁶*Re W (Abduction: Domestic Violence)* [2004] EWHC 1247 (Fam) 507 para 4(c).

In *Re E (Children) (Abduction: Custody Appeal)*¹⁸⁷ the High Court held that the provisions of Article 13(b) of the Convention were clear and they needed neither elaboration nor gloss; and that the provisions of Article 13(b) by themselves demonstrated the restricted availability of the defence. As a result, the Court held that where the left behind parent or applicant denies the allegations of domestic violence, the Court should first ask whether those allegations are true and whether there would be a grave risk that the child would be placed in an intolerable situation. If the aforementioned questions are answered in the affirmative, the court must then ask how the child in question can be protected against the risk. In instances where the child cannot be protected, the court should endeavour to determine the truth of the disputed allegations of domestic abuse.

Research indicates that the challenges in proving any of the exceptions in the Hague Convention applications and the narrow interpretation utilised by English courts permits hard and insensitive results for abducting parents and their children in cases where abuse is involved.¹⁸⁸ Countless research conducted over the past four decades indicates that children who have witnessed domestic violence are likely to face long term repercussions in respect of, among other things, their psychological and behavioural development.¹⁸⁹ Despite the aforementioned consequences that domestic violence has on children, service support and delivery is still fragmented in the UK. The UK government needs to reconsider the evidence from research and practice that indicates the extent of the aforementioned problem and its effects on children so that the government can recognise the need to appropriately fund and deliver supportive services.¹⁹⁰

Despite the fact that all member States of the European Union are party to the Hague Abduction Convention, certain provisions of the 'Brussels II *bis*' Council Regulation¹⁹¹ viz.

¹⁸⁷[2011] UKSC 27.

¹⁸⁸Bruch (2004) *Fam LQ* 534.

¹⁸⁹Milner B A 'Recognising Children and Young People Living and the Context of Domestic Violence' 2010 *Internet Journal of Criminology* 1. Available at www.internetjournalofcriminology.com (accessed 6 November 2015).

¹⁹⁰Milner B A (2010) *Internet Journal of Criminology* 1.

¹⁹¹Council Regulation (EC) No. 2201/2003 on Jurisdiction, Recognition and Enforcements of Judgments in Matrimonial Matters and Matters of Responsibility Repealing Regulation (EC)

Articles 10, 11, 40, 42 and 55 prevail over rules in the Convention in relevant applications made between Member States. Article 11 of the 'Brussels II bis' Regulation aims to tighten the summary return regime, due to concerns that Article 13(b) of Hague Abduction was not being strictly construed.¹⁹² The European Union position is discussed in detail in paragraph 7 below.

6.4.2 The USA approach regarding the grave-risk defence

Initially, the USA courts utilised the narrow approach regarding the grave risk defence for example, in the case of *Friedrich v Friedrich*¹⁹³ where the Court of Appeal held that a "grave risk" only existed in two situations. Firstly, where returning the child would place the child in imminent danger before the resolution of a custody dispute and secondly, where there was evidence of serious abuse of the child, or an extraordinary emotional dependence, and the courts in the country of habitual residence were incapable or unwilling to give the child adequate protection. The Court further held that Article 13(b) of the Convention was not intended to be utilised by defendants as a vehicle to litigate or re-litigate the child's best interests. Furthermore, only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination. The court also held that the defendant must show that the risk to the child is grave, not merely serious.

The issue relating to the nature of the harm entails that the harm must be "a great deal more than minimal." Therefore, the courts will deny the return of a child only in situations when the child's danger is "grave" or "severe" and not just "serious."¹⁹⁴ "[E]ven incontrovertible proof of a risk of harm will not satisfy" this defence if the "risk of harm proven lacks gravity."¹⁹⁵

No 1347/2000, [2003] OJ L338/1-29 (Brussels II bis Regulation). Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201> (last accessed on 5 February 2016).

¹⁹²Fleming K (2014), para 3.2. See also http://ec.europa.eu/justice/civil/document/index_en.htm (last accessed 5 February 2016).

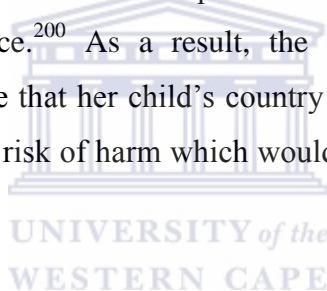
¹⁹³78 F.3d 1080 8 (6th Cir. 1996) para III.

¹⁹⁴See *Karpenko v Leendert*, No. 09-03207, 2010 WL 831269, at 8 (E.D. Pa. Mar. 4, 2010).

¹⁹⁵*Laguna v Avila*, No. 07-CV-5136 (ENV), 2008 WL 1986253, at 8.

The *Friedrich* approach was followed by various USA courts in the past.¹⁹⁶ However, in some cases, USA courts made some effort to find ways to avoid the aforementioned narrow approach. For example, in *Blondin v. Dubois*,¹⁹⁷ the Second Circuit upheld the District Courts refusal to return children to France because the expert's testimony indicated that they would face a repetition of traumatic stress disorder.

In some of the USA courts where the grave risk defence was raised, the courts also examined whether the country of habitual residence had the means to protect the child from potential abuse.¹⁹⁸ However, during 2008, the Eleventh Circuit in the case of *Baran v. Beaty* held that neither the Hague Convention, the International Child Abduction Remedies Act nor the Perez-Vera Report require that a court should review evidence of whether the habitual residence can protect at-risk children.¹⁹⁹ The court indicated that the review of the aforementioned evidence would require evidence of the habitual residence's "legal and social service systems" which can lead to "difficult problems of proof" because the abducting parent left the habitual residence.²⁰⁰ As a result, the court declined to "impose on a responding parent a duty to prove that her child's country of habitual residence is unable or unwilling to ameliorate the grave risk of harm which would otherwise accompany the child's return."²⁰¹



Unlike the UK courts, the USA courts started since approximately the year 2000 to adopt a new approach in cases where domestic violence is raised as the basis of a defence under Article 13(b) of the Hague Convention. According to Jeremy Morley, an American legal

¹⁹⁶*Friedrich v Friedrich* 78 F.3d 1080 8 (6th Cir. 1996) para III. The *Friedrich* approach was followed for example in *Rydder v Rydder* 49 f.3d 369, 372 (8th Cir. 1995); *Nunez-Escudero v Tice-Menley* 58 F.3d 374, 377-378 (8th Cir.1995).

¹⁹⁷238 F.3d 153 (2d Cir. 2001) [*Blondin IV*]; See also *Danaipour v. McLarey*, 286 F.3d 1, 4 (1st Cir. 2002).

¹⁹⁸*Walsh v Walsh* 221 F.3d 204 (1st Cir. 2000).

¹⁹⁹526 F.3d 1340, 1347-48 (11th Cir. 2008) (affirming district court's decision not to return child due to a grave risk of harm).

²⁰⁰*Baran v Beaty* 526 F.3d 1340 (11th Cir. 2008). INCADAT cite. HC/E/USf 1142. Available at www.incadat.com (accessed 28 October 2015).

²⁰¹*Baran v Beaty* at 1348.

expert in international family law: “There has been a dramatic shift in recent years in the USA law concerning grave risk of harm and a growing realization that it is inappropriate to order that children be sent back to face domestic violence without a full evaluation of the nature of the prior abuse & of the likelihood that the authorities in the country to which the children are being returned will indeed fully protect them & their abused mother.”²⁰² Furthermore, there are indications that the incidence of successful grave risk defences has increased globally.²⁰³

Examples of cases in which the USA Courts discarded the narrow approach to the interpretation of Article 13(b) of the Convention include the case of *Walsh v Walsh*²⁰⁴ where the court recognised that the child's exposure to domestic violence is a sufficient risk to prevent a child's return under the Convention. In this case the children had witnessed the abuse and assault of their mother by the father. The court held that there was credible social science literature that established and proved that serious spousal abusers are also likely to abuse their children.²⁰⁵

In *Reyes Olguin v. Cruz Santana*,²⁰⁶ the court held that there was a great risk of “severe” psychological harm upon the child’s return to Mexico because expert evidence indicated that if sent back, the child would experience “suicidal impulses generated by his prior trauma” of witnessing his father assault his mother, as well as his own experience of the abuse.

²⁰²Morley J D ‘The Future of the Grave Risk of Harm Defense in Hague Cases’ 2007 *International Family Law* at the Conclusion. Available at http://www.international-divorce.com/grave_risk_harm_defense.htm (accessed 12 May 2015).

²⁰³2011 Hague Global Statistical Analysis, page 30. Available at <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (accessed 7 April 2015); 2011 Hague Statistical Analysis National Reports, page 205. Available at <http://www.hcch.net/upload/wop/abduct2011pd08c.pdf> (accessed 7 April 2015). According to the report “USA courts have higher than average judicial return rates and fall below the global average in applying the grave risk defence as a basis for refusing a return”.

²⁰⁴221 F.3d 204, 218 (1st Cir. 2000).

²⁰⁵*Walsh v Walsh* 221 F.3d 204, 218 (1st Cir. 2000) 58.

²⁰⁶2004 WL 1752444 (E.D.N.Y), at 7. http://www.missingkids.com/en_US/HagueLitigationGuide/Olguin.pdf (accessed 7 April 2015).

In the case of *Van de Sande v Van de Sande*²⁰⁷ a mother abducted her two children from Belgium and retained them in the USA. Subsequently, the father lodged a Hague application for the return of the children and the abducting parent presented evidence showing that she was a victim of severe domestic violence at the hands of the left behind parent. She also alleged that the left behind parent had threatened to kill her and the children. The Court of Appeals held that the evidence presented by the abducting parent was sufficient to establish a *prima facie* case of "grave risk of harm" to the children and ordered that the children should not be returned to Belgium because they would face a grave risk of harm if returned to the left behind parent, taking into account the left behind parent's propensity for violence and his disregard for the children's welfare by beating their mother in their presence. The Court further held that a court must satisfy itself that a child will actually be protected if returned to the left behind parent; and it is not sufficient that this protection exists only in theory. Furthermore, although comity among nations requires a narrow interpretation of the "grave risk" defence, the safety of children is of paramount importance and should take preference.²⁰⁸

In the recent USA case of *Ermini v. Vittori*,²⁰⁹ the Court of Appeals for the Second Circuit indicated that abuse alone is sufficient enough to trigger the grave risk exception. The court had to decide whether severe forms of physical and psychological harm caused by separating a child from autism treatment are sufficiently serious to trigger the Hague Convention's grave risk of harm exception.²¹⁰ The court held that the result of an autistic child being separated from autism treatment was grave enough to deny return back to the place of habitual residence.

Several reasons have been advanced for the need for the less strict interpretation and application of the grave risk exception by the USA courts. Firstly, it is apparent that when the Convention was drafted, the assumption on the part of the drafters was that the abductors of children would primarily be non-custodian fathers. However, the aforementioned assumption is erroneous in that there are indications that currently most of the abductors are mothers who

²⁰⁷431 F.3d 567 (7th Cir. 2005).

²⁰⁸*Van de Sande v Van de Sande* 431 F.3d 567 (7th Cir. 2005) 10.

²⁰⁹758 F.3d 153 (2d Cir. 2014)758 F.3d at 164-65.

²¹⁰*Erminiv.Vittori* at 156.

are the primary caretakers of their children who escape with their children to break out of domestic violence and abuse.²¹¹ Therefore, no consideration was given to the fact that the remedy of return required by the Convention would not be in the best interest of a child if the child is placed in the care of a violent left behind parent or non-custodian father.²¹²

Most of the USA court decisions delivered since the beginning of the millennia clearly indicate that Article 13(b) can be subject to different interpretations and application by USA courts, and as a result, some experts have argued that courts should use more common sense and be more reasonable in refusing to send children back to conditions where they will possibly be subjected to further domestic violence. Apparently, previous USA court decisions indicate that courts have been far too "grudging" when faced with an Article 13(b) defence by abducting parents.²¹³ Furthermore, courts should realise that domestic violence and the fear of violence can in most cases be sufficient for the abducting parents to successfully invoke the grave risk of harm defence.²¹⁴

The USA case law also indicates that States are becoming increasingly sensitive to the relevance of domestic violence for the grave risk of harm defence because numerous courts took cognisance of the fact that physical abuse perpetuated against the abducting parent is relevant to the Article 13(b) defence, even if the children involved were not subjected to such physical abuse.²¹⁵

6.4.3 The RSA approach regarding the grave-risk defence

In most of the RSA cases involving the grave risk defence, the courts are following a wider approach to the defence due to the fact that the best interests of a child will be of paramount

²¹¹Wills M 'Interpreting the Hague Convention on International Child Abduction: Why American Courts need to reconcile the Rights of Non-Custodial Patents, the Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention' (2006) 25 *Rev Litig* 447-448.

²¹²Wills (2006) *Rev Litig* 454.

²¹³Bruch (2004) *Fam LQ* 529.

²¹⁴Wills (2006) *Rev Litig* 457.

²¹⁵For example see *Baran v. Beaty* where it was held that the left behind parent's previous violent acts contributed to the grave risk of harm.

importance. This approach is firmly entrenched in the RSA Constitution of 1996 and the Children's Act No 38 of 2005.²¹⁶ In the case of *Sonderup v Tondelli* the Constitutional Court indicated, with regard to "grave risk of harm" that "an Article 13 enquiry is directed to the risk that the child may be harmed by a court ordered return. The risk must be a grave one. It must expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The words "otherwise place the child in an intolerable situation" indicate that the harm that is contemplated by the section is harm of a serious nature."²¹⁷ Apparently, there must be objective evidence indicating that there is risk that the child may be harmed.²¹⁸

The RSA courts have embraced the fact that the grave risk exception allows the courts to make an enquiry into the child's best interests, but this enquiry is restricted.²¹⁹ In the case of *Penello v Penello (Chief Family Advocate as Amicus Curiae)*²²⁰ the abducting mother argued that her relationship with her husband had irretrievably broken down to the extent that cohabitation with her husband had become physically and psychologically intolerable.²²¹ The court held that the grave risk defence is always focused on the interests of the child in question and the risk of harm to which the child may be exposed if the child is ordered to return to the left behind parent.²²² The court further indicated that the conduct of the abducting parent may be one of the relevant factors to consider in determining if grave risk exists and the court found that the abducting parent had herself to blame for the situation she found herself in.²²³ Furthermore, the court indicated that the age of the child concerned may also be a relevant factor in determining if the grave risk defence exists, but there are no grounds to differentiate in principle on the basis of age, or to be influenced by some kind of

²¹⁶*Sonderup v Tondelli and Another* (CCT 53/00 [2000] ZACC 26; 2001 (2) BCLR 152; 2001 (1) SA 1171.

²¹⁷*Sonderup v Tondelli and Another*, paragraph 44.

²¹⁸The court in *Sonderup v Tondelli* relied on *WS v LS* 2000 (4) SA104 (C) at 115E–F).

²¹⁹*Chief Family Advocate & another v G* 2003 (2) SA 599 (W) at 611J–612C; *Family Advocate v B* [2007] 1 All SA 602(SE) paras 11, 13.

²²⁰2004 (3) SA 117 (SCA).

²²¹Page 140 G-H.

²²²Page 144 B-C

²²³Page 145 C-E.

"tender years" principle when applying the Convention.²²⁴ The court held that the abducting parent did not discharge the onus resting on her and the court ordered that the child be returned to the left behind parent in the USA.

In *Family Advocate v B*²²⁵ the abducting parent removed the child from the UK to the RSA without the required consent. The left behind parent instituted return proceedings in terms of the Convention and the abducting parent raised the grave risk defence. The court considered the abducting parent's evidence regarding the left behind parent's acts of domestic violence against her which compelled her to flee her home and seek refuge elsewhere.²²⁶ Furthermore, the court took the child's views into account that he does not desire to be separated from the abducting parent.²²⁷ The court found that although the child was only seven years old, he was mature enough to make an informed decision.²²⁸ Furthermore, the court considered the expert opinion of the curator *ad litem* and the psychologist who evaluated the child and concluded that it was in the best interest of the child to remain in the RSA with the abducting parent.²²⁹ The court dismissed the left behind parent's application.

In the recent case of *Central Authority of the Republic of RSA v KT*²³⁰ the court held that the grave risk defence had been established because the left behind parent was aggressive and disposed to losing his temper, that this was "not a case where one parent has absconded with the child to an unfamiliar country". The court also held that the abducting parent as a party to an abusive relationship had no one to turn to and had no ties with the country at all and consequently she would find it difficult to return to the country of the child's habitual

²²⁴Page 144 F-G.

²²⁵2007 (1) All SA 602 (SE).

²²⁶ Page 605 para 5.

²²⁷Art 13(2) of the Convention provides that an application for the return of the child may be dismissed if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views. See also section 278(3) of the Children's Act which deals with issues relating to the child's objection.

²²⁸Paras 13-14.

²²⁹See pages 608-609 at para 9-10.

²³⁰2015 JDR 0036 (GI).

residence. Furthermore, the court also held that the child had “fully integrated into his life in the country and was well adjusted”.²³¹

Apparently, the decision in *Central Authority v KT* drives a “coach and four” through the Hague Convention because the “grave risk” was no more than the risks asserted by the abducting parent in *Penello v Penello* and the other cases discussed above. It is an inconsistency in RSA Hague Convention jurisprudence.²³²

6.4.4 The Swiss approach regarding the grave-risk defence

The Swiss established that the Hague Convention defences, including the grave risk defence, are interpreted too narrowly in various situations, resulting in harsh outcomes for the children involved. These situations include instances where the abducting parent abducted the children in order to escape domestic violence and courts sometimes returned the child despite the fact that the abducting parent cannot safely return with the child.²³³

Though the Convention was found to be compatible with Swiss Constitution,²³⁴ the Swiss government and reformers became concerned about the application of the Hague Convention defences following the 2006 case of Russell Wood and Maya Wood-Hosig (“the *Wood* case”).²³⁵ In the *Wood* case, the abducting parent took her two children from Australia to Switzerland and when she was discovered in Switzerland, her children were forcibly removed from her and institutionalized for a year until they could be returned to Australia. Upon arrival in Australia, they were again placed in foster care because the father was unable to care for the children. Eventually, the Australian court gave the mother custody and the children were ordered to be returned to Switzerland.

²³¹ Paragraph 50.

²³² Julyan J, The Hague Convention on the Civil Aspects of International Child Abduction Recent Developments in South Africa, 2nd Annual Johannesburg Family Law Conference, 2 October 2015.

²³³ Weiner M, 2008 page 340.

²³⁴ 5P.1/1999, Bundesgericht (Tribunal fédéral), [INCADAT cite: HC/E/CH 427.

²³⁵ Available at <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Hansard> (accessed 7 April 2015).

Switzerland succeeded in dealing with the limitations caused by, among others, the interpretation of Article 13(b) in instances where there are allegations of domestic violence.²³⁶ The Swiss Parliament passed a law to the effect that an “intolerable situation”

exists for purposes of Article 13(b) when, but not only when, the following criteria are met:

- a. placement with the parent who filed the application is manifestly not in the child’s best interests;
- b. the abducting parent is not, given all of the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or if this cannot reasonably be required from this parent; and
- c. placement in foster care is manifestly not in the child’s best interests.²³⁷

The Swiss Act also requires the court to “hear the child in an appropriate manner or appoint an expert to carry out this hearing unless the age of the child or another valid reason prevents this.”²³⁸ Furthermore, the Swiss legislation has extensive provisions regarding the handling of the Hague Convention cases and also judiciously provides that the Central Authority should involve specialists with multidisciplinary knowledge to assist the family in reaching a voluntary resolution, by utilising alternative dispute resolution like conciliation and mediation, if necessary.²³⁹

In Swiss law the term “intolerable situation” in Article 13(b) is a separate defence to the Convention’s remedy of return. As a result, the Swiss courts cannot ignore the “intolerable situation” language or presuppose that it is coextensive with the “grave risk of harm” language.²⁴⁰ The rationale behind two separate defences in Article 13(b) is that failure to separate the “grave risk of harm” and “intolerable situation” has unnecessarily limited the scope and application of the “intolerable situation” defence because something may create an “intolerable situation” for the child, but not cause that child a “grave risk of physical or psychological harm”, for example, the separation of siblings.²⁴¹

²³⁶Weiner M, 2008 page 341.

²³⁷Weiner M, 2008 page 343.

²³⁸Weiner M, 2008 page 344.

²³⁹See Swiss Federal Act arts. 3, 4, Dec. 21, 2007.

²⁴⁰Weiner M, 2008 page 345.

²⁴¹Weiner M, 2008 page 348.

There are a few cases where the Swiss Courts have rejected the abducting parent's arguments regarding domestic violence. For example, in *Obergericht des Kantons Zürich (Appellate Court of the Canton Zurich)*, 28/01/1997, U/NL960145/II.ZK²⁴² the abducting parent argued that the left behind parent was a danger to the children because, among other things, he had sexually abused the daughter. The court rejected the abducting parent's assertions because she had previously left the children with the left behind parent whilst she travelled abroad. Furthermore, there are examples of cases where the Swiss courts took a very strict approach regarding the Article 13(b) exception in instances where the abducting parent who was a primary caregiver threatened not to accompany a child back to the State of habitual residence if a return order was made.²⁴³

Apparently the Swiss legislation highlights the challenges which may arise if the abducting parent who was a victim of domestic violence and the child are returned without proper consideration of the post-return situation in the requesting State. By allowing the child to stay with the abducting parent in the requested State, far away from the abusive left behind parent, the "best interests" approach of the Swiss law appears to be the most suitable solution for protecting victims of domestic violence and their children.²⁴⁴

7. European Union and Jurisprudence of the European Court of Human Rights

According to the Status Table for the Hague Abduction Convention, all the member States of the European Union are members of the Hague Abduction Convention.²⁴⁵ During the negotiation of what became known as the Brussels II Regulation, a European solution was needed which would provide 'added value' for the European citizens with regard to child abduction matters because there were concerns regarding the prompt return principle and the fact that Article 13(b) of the Hague Convention was not strictly applied. However, the

²⁴²INCADAT Reference: HC/E/CH 426.

²⁴³See for example the cases of 5A_285/2007/frs, IICour de droit civil, arrêt du TF du 16 août 2007 [INCADAT Reference: HC/E/CH 955] and 5A_479/2012, IICour de droit civil, arrêt du TF du 13 juillet 2012 [INCADAT Reference: HC/E/CH 1179].

²⁴⁴Fleming K (2014), Chapter 6.

²⁴⁵Status Table for the 1980 Hague Convention on the Civil Aspects of International Child Abduction. Available at http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last accessed on 3 February 2016).

Brussels II Regulation preserved the Hague Convention for intra-Member State abductions. However, some of the provisions of the ‘Brussels II *bis*’ Council Regulation²⁴⁶ prevail over provisions of the Hague Abduction Convention in applications which are made between member States.²⁴⁷

In terms of the provisions of Article 11(4) of the Brussels II Regulation, the return of a child cannot be refused under Article 13(b) of the Hague Convention, if it is established that adequate arrangements have been made to secure the protection of the child after his/her return to his/her place of habitual residence. The Practice Guide to the Regulation states that it is not sufficient that procedures exist within the Member State of origin: it must be established that the authorities have taken *tangible measures* to protect the child in question.²⁴⁸ Apparently, Article 11(4) has the potential to be of great assistance in child abduction cases involving domestic violence because it encourages the use of protective measures. Unfortunately, the Practice Guide to the Regulation does not provide a definition of what constitutes “adequate arrangements”; as a result this weakens the provision’s ability to provide a more positive outcome in child abduction cases involving domestic violence. The other weakness that is evident in the aforementioned Regulation is that it does not provide any protective measures for the abducting parents. According to Ruth Lamont, the aforementioned Regulation has the potential to protect all the victims of domestic violence in abduction matters, if it can be interpreted more broadly. She asserts that “if a return is initially refused on the grounds of one of the exceptions, the courts in the State of origin may decide the substantive custody dispute, with the child remaining abroad during litigation.”²⁴⁹

There are indications that in the past the Strasbourg Court interpreted the European Convention based on the principles of the Hague Convention. For example, in *Maumousseau*

²⁴⁶Council Regulation (EC) No. 2201/2003 on Jurisdiction, Recognition and Enforcements of Judgments in Matrimonial Matters and Matters of Responsibility Repealing Regulation (EC) No 1347/2000, [2003] OJ L338/1-29 (Brussels II *bis* Regulation), articles 10, 11, 40, 42 and 55.

²⁴⁷McEleavy P (2015) para 2.2.

²⁴⁸Practice Guide for the application of the new Brussels II Regulation, 32 (emphasis added) Available at http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf (last accessed on 5 February 2016).

²⁴⁹Lamont R ‘Mainstreaming Gender into European Family Law: The Case of International Child Abduction and Brussels II Revised’ (2011) 17 *European Law Journal* 382.

and *Washington v France*,²⁵⁰ the European Court recognised that it is within the child’s best interests to be returned to the State of habitual residence and also acknowledged that the return mechanism is not “automatic”; the exceptions of the Hague Abduction Convention can be raised “based on objective considerations concerning the child and its environment.”²⁵¹ The aforementioned approach in the *Maumousseau* case harmonised the European Convention with the aims and purpose of the Hague Abduction Convention, but unfortunately, subsequent decisions by the Strasbourg Court created a conflict between the two Conventions. For example, in 2010 the court in *Neulinger and Shuruk v Switzerland*²⁵² utilised the principles of the European Convention in dealing with a case involving domestic violence.

The primary focus for the Grand Chamber in the European Court of Human Rights in the *Neulinger v Switzerland* case was whether the interference in the family life of the child and mother as provided for in Article 8 of the European Convention on Human Rights was necessary in a democratic society. The case involved a unilateral relocation by a custodial mother (abducting parent) despite the existence of a *ne exeat* restriction. The abducting parent (a Swiss national) decided to abduct her son after the Israeli courts refused to lift a *ne exeat* restriction to travel with her son to Switzerland. The abducting parent unilaterally removed the child to Switzerland, where she hid the whereabouts of the child for sometime. However, the left behind parent managed to locate the child and he filed a Hague abduction application within a year of the wrongful removal. The Swiss courts had considered the Article 13(b) defence and decided that the abducting mother was able to return with the child to Israel and commence proceedings there. Nevertheless the Grand Chamber held that the situation must be assessed at the time of the enforcement of the return order – that is more than two years after the return order was made and more than 4 years after the initial abduction. The Grand Chamber held that the settlement of the child in the new country and the difficulties the abducting parent would face if she returned to Israel were sufficient reasons to establish that enforcement of a return order would interfere with family life. The Court of Human Rights indicated that that the best interests of the child must be assessed in each individual case and that it was obliged to “ascertain whether the domestic courts conducted an in-depth

²⁵⁰App No. 39388/05 (ECtHR, 6 December 2007) para 71.

²⁵¹Para 72.

²⁵²App no. 41615/07 (ECtHR, 6 July 2010), Application No 41615/07). INCADAT cite. HC/E/ 1001.

examination of the entire family situation and of a whole series of factors” as to what would be best for an abducted child in the context of an application for return.²⁵³

The subsequent decision of *Raban v Romania*²⁵⁴ reiterated the principles in the *Neulinger* case. In the *Raban* case, the Strasbourg Court upheld the Romanian decision that returning the abducted child to Israel would not be in the child’s best interests because, among others, of the “state of insecurity” in Israel. The aforementioned decision appears to be a more liberal interpretation of Article 13(b) of the Hague Abduction Convention because in the past the UK held that the “state of insecurity” in Israel does not give rise to a successful defence of Article 13 (b).²⁵⁵

Though the Grand Chamber decision of *Neulinger and Shuruk v Switzerland* is contrary to the primary objectives of the Hague Abduction Convention, it appears to be in favour of domestic violence victims, who would benefit from an examination of the domestic violence allegations. It will be of great assistance if the approach utilised in the aforementioned cases can be utilised in all Hague abduction cases involving domestic violence.

According to recent research, there are indications that there have been many high profile abduction cases where the new rules in the European Union have been ignored or they failed to operate as intended. Furthermore, the preliminary conclusions from an empirical study indicates that in most instances abducted children are seldom returned to their State of origin under the Article 11(8) of the Brussels II Regulation.²⁵⁶ Furthermore, in Strasbourg the picture continues to be mixed because some judgments supported the objective of return and a strict interpretation of the exceptions in their application of Article 8 of the Brussels II Regulation and some of the judgments appear to reject the fundamental premise of the Hague Convention.²⁵⁷

²⁵³Para 138 -139.

²⁵⁴App no 25437/08 (ECtHR, 26 October 2010) INCADAT cite HC/E/1330.

²⁵⁵See *Re S (A Child)* [2002] EWCA Civ 908.

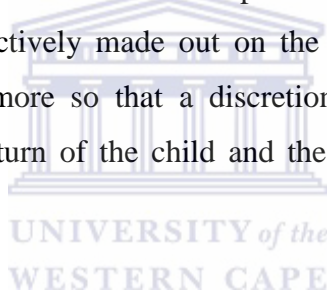
²⁵⁶McEleavy P (2015) para 2.2.

²⁵⁷McEleavy P (2015) para 3.3.4.

8. Subjective perception of risk

Article 13(b) does not deal with situations where there is subjective perception of risk. In *E (Children)* (Abduction: Custody Appeal), *Re* [2011] UKSC 27; [2012]1 A.C.144 (SC) the Court found that where the fears were genuinely held (albeit not objectively established) and were of such an intensity as to impact significantly on functioning (and parenting) then they had a genuine role in creating “risk” for the children who were the subject of the proceedings. The aforementioned decision may be criticised for diluting the aims of the Convention or raising the bar against the making of return orders. However, the Court of Appeal reiterated that it had not changed the test or raised the bar to return in its decision in *Re S (A Child)* [2012] UKSC 10.

Considering that the conduct which constitutes “abuse” differs in magnitude, degree and from case to case, how is the court then to deal with the potentially very real fear of abuse which fear does not appear to be objectively made out on the evidence? Abducting parents are placed in a difficult situation, more so that a discretion ultimately rests with the judge whether to deny or allow the return of the child and the judge’s discretion is fallible and subject to human error.



9. Application of Article 13(b) exception - "Intolerable Situation"

International jurisprudence is not clear and is divided on whether the second part of Article 13(b) on "intolerable situation" should play a greater role in instances where the abducting parent raises the issue of domestic violence. “Intolerable situation” is not defined in the Convention, but the words “grave risk” and “intolerable” clearly suggest that the defence is narrow. This is confirmed by the Pérez-Vera Explanatory Report, which calls for all the defences to be interpreted in a “restrictive fashion.”²⁵⁸ There are indications in the Pérez-Vera Explanatory Report that “intolerable situation” was intended to refer, among other things, to

²⁵⁸Pérez-Vera, Explanatory Report, Note 59, at 434.

instances where there was domestic/family violence, but the child was not the direct target of such physical or psychological abuse.²⁵⁹

There are arguments that the abducting parent's perception of intolerability caused by domestic violence would be inextricably linked to the child's psychological well-being. However, such arguments were not always successful in court, but the courts often affirmed the validity of assessing intolerability by considering the abducting parents'/primary carer's wellbeing, as that the child's "interests are inextricably tied to their mother's psychological and physical security."²⁶⁰

In the USA there are no indications that a "grave risk of physical or psychological harm" is required for an "intolerable situation," it is believed that a "grave risk of physical or psychological harm" was an "intolerable situation."²⁶¹ Therefore, in the USA, the intolerable situation defence is rarely utilised, as a result there is lack of case law on the intolerable situation defence and little precedent for courts to follow.²⁶² In the UK the courts are generally following a strict interpretation of Article 13(b) and there are suggestions that the extension of an otherwise restrictive interpretation of Article 13(b) will create a legal loophole, which would leave the exception open to some manipulation.²⁶³

Apparently, the "intolerable situation" defence is established in situations when the disadvantage faced by an individual child affected by the abduction outweighs the potential benefits all children receive from deterring international abduction. The Swiss formulation of

²⁵⁹For instance in *Sonderup v Tondelli* where the harm foreseen upon the child's return was "the natural consequence of her removal", despite the alleged presence of domestic violence prior to the abduction.

²⁶⁰In the RSA case of *Pennello v Pennello* the Supreme Court of Appeal held that the abducting parent's evidence indicating that cohabitation with the left behind parent had become physically and psychologically intolerable was sufficient despite the fact that there was no "established pattern of domestic violence."

²⁶¹Weiner M, 2008 page 346 -7.

²⁶²Brown-Williams K (2011) 70.

²⁶³Fleming K (2014), para 4.3.

“intolerable situation” covers instances which most observers would find morally intolerable.²⁶⁴

10. Mature Child Objection to Removal Defence

There is also an exception in Article 13 which relates to a child’s objection to being returned where she/he has reached an age and degree of maturity at which it is appropriate to take account of his/her views. In terms of Article 12 of the CRC, the child has the right to express his or her views and to have them given due weight, considering the age and maturity of the child. As indicated by the Committee on the Rights of the Child, "participation" in Article 12 of the CRC can be described as: ‘[The] ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.’²⁶⁵ Article 12 is considered as the “soul” of the CRC because children are recognised as independent bearers of human rights,²⁶⁶ and they have the right to some self-determination and are no longer regarded as mere property.²⁶⁷ Apparently, Article 12 dispels the myth that children are incompetent, irresponsible and are in need of protection, shortly that "the child is an incomplete human being."²⁶⁸ However, it seems that some countries still lack the understanding of what constitutes an obligation to hear children.²⁶⁹

²⁶⁴Weiner M, 2008, page 355.

²⁶⁵Committee on the Rights of the Child, General Comment No. 12 (2009) - The right of the child to be heard, para 5.

²⁶⁶Sloth-Nielsen J, 2015 Children’s rights, the digital era and freedom of expression: an analysis from the African perspective. Available at <https://www.apc.org/en/system/files/Chapter/pdf> (last accessed 23 January 2016).

²⁶⁷Sloth-Nielsen ‘Ratification Of The United Nations Convention On The Rights Of The Child: Some Implications For South African Law’ 1995 SAJHR, 404; Mezmur B M, 'The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SAPR/PL*. 1

²⁶⁸Krappmann L ‘The weight of the child’s view (Article 12 of the Convention on the Rights of the Child)’ (2010) 18 *International Journal of Children’s Rights* 503.

²⁶⁹UNICEF - Every Child’s Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child - General Comment No.12 (2011) page 1. Available at <http://www.unicef.org> (last accessed 5 February 2016).

The CRC's Committee on the Rights of the Child specifically addressed, among others, issues relating to the views of the child, thereby reaffirming their commitment to the realisation of Article 12 of the Convention and stating that '[t]he right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention'.²⁷⁰ In view of the aforementioned Committee's commitment, Article 12 is not only a right in itself, but it should also be taken into consideration when interpreting and implementing all other rights.²⁷¹

There is a wide divergence of practice amongst the Convention's signatory States as to the age at which it is appropriate to take account of a child's views and how these views should be ascertained.²⁷² In terms of Article 12 of the Convention, it is clear that age is not the determining factor regarding the weight that should be attached to the views which were expressed by the child. There are indications that certain factors like the child's experiences, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form or express a view. Furthermore, the children's capacity to form and express a view should be assessed on a case-by-case basis.²⁷³

It is crucial that the feelings of the abducted child should be explored at an early stage of the return proceedings and, where a return is ordered, the child's expressed views should be taken into consideration regarding the return. Furthermore, depending on the child's age or maturity, the child should be fully informed about all the consequences of the return order.²⁷⁴ In most democratic countries, including the four countries covered in this thesis, there is

²⁷⁰General Comment No.12 (2009) 'The right of the child to be heard' (Fifty - First session, Geneva, 25 May – 12 June 2009) para 2, 5 and 71.

²⁷¹The other fundamental values identified by the Committee on the Rights of the Child are non-discrimination (Article 2), the best interests of the child (Article 3) and the right to life, survival and development (Article 6).

²⁷²Freeman M, International Centre For Family Law Policy And Practice 'Parental Child Abduction: The Long-Term Effects' (5 December 2014) page 14. Available at www.famlawandpractice.com (last accessed 28 January 2016).

²⁷³General Comment No.12 (2009) 11.

²⁷⁴Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement, at page xii. Available at www.hcch.net (accessed on 20 January 2016).

generally a growing understanding of the importance of listening to the children in cases affecting them. In order to address the challenges brought about by domestic violence in Article 13(b) applications, it is crucial that the children affected by international abductions should be heard in all cases, if that is possible.

11. Conclusion

The provisions of Article 13, like other key provisions of the Hague Abduction Convention, have generated a lot of litigation, and in some instances with different interpretations emerging throughout the 90 ratifying States. This is understandable, because the Hague Convention is a global instrument and the Contracting States enjoy procedural autonomy in respect of the manner in which they handle return proceedings.²⁷⁵ Due to the different interpretations given to Article 13 of the Convention, in many instances it operates against the rights and interests of domestic violence victims. There is tension between the interest in discouraging international child abduction and protecting victims of domestic violence. The aforementioned challenges are caused by, among others, the fact that the Convention is silent about the evidentiary standard that is required from abducting parents to prove grave risk under Article 13(b); the Convention merely states that the exceptions must be “established”. As a result, the evidentiary standard varies among Contracting States. This challenge can be addressed by providing an explicit domestic violence defence and specifying the evidentiary standard that is required from the abducting parents.

Apparently, when Article 13(b) of the Hague Abduction Convention was drafted, domestic violence was not salient in the public eye and the drafters did not foresee that child abductions can be carried out by victims fleeing domestic violence, particularly mothers. There are indications that the Convention operates on the basis that the abduction itself is a form of domestic violence.²⁷⁶ In view of the fact that the profile of abductors has changed, the courts in contracting States are placed in a difficult position because they are applying the provisions of Article 13(b) to cases that the Convention’s drafters did not anticipate when the Convention was drafted. I submit that this problem can be tackled by providing for a domestic violence defence which accommodates abducting mothers who abduct their children to flee from domestic violence.

²⁷⁵McEleavy P (2015) para 2.1.

²⁷⁶Quillen B (2014) 625.

The other challenge involving Article 13 relates to the meaning of "grave risk of harm". The absence of a definition of "grave risk of harm" has resulted in different interpretations of the term by the Contracting States. This challenge can be addressed by defining "grave risk of harm" in the Convention. In addition to the aforementioned challenge, the court's scrutiny of the Article 13(b) grave-risk defence could be impacted by the Convention's prompt return principle. For example, domestic violence victims may require expert witnesses to testify about the "grave risk of harm" to the child, and this process may result in delays in the finalisation of the return proceedings. The latter challenge can be addressed by legislating an explicit domestic violence defence. The prompt return principle can be suspended in instances where there is evidence of domestic violence on the part of the left behind parent.

In instances where the Convention defences were interpreted too narrowly it resulted in harsh outcomes for the children involved. For example, some of these children ended up in foster care or with the alleged abuser.²⁷⁷ In only a few Convention cases have judges in different member States accepted that children's exposure to their mothers' victimization at the hands of an abusive left behind parent represents a grave risk of harm to the children and denied the left behind parents' applications for their children's return.²⁷⁸ The inclusion of an explicit domestic defence would assist in furthering the best interests of children because it will alleviate the challenge faced by the courts in recognizing that domestic violence is harmful to children. The reticence of the majority of courts to connect domestic violence with a grave risk of harm to children runs counter to the weight of social science research, which has clearly established possible risks to children exposed to domestic violence that may be as significant as those children who have directly been victims of physical or sexual abuse.²⁷⁹ An explicit domestic violence defence will also promote the social science research conducted after enactment of the Hague Abduction Convention which indicates that in most instances the abuse does not stop when the parents separate. Furthermore, an explicit domestic violence exception would force judges to be consistent with current and accepted

²⁷⁷Malhotra A 'To Return or Not to Return: Hague Convention versus Non-Convention Countries' (2010) 13 *Journal of Family Law and Practice* 59.

²⁷⁸*Walsh v. Walsh* (1st Cir. July 25, 2000) *INCADAT* cite. HC/E/USf326. Available at www.incadat.com (accessed 7 April 2015). The Court looked to social science literature for support in accepting a grave risk defence raised by the abducting parent.

²⁷⁹Edleson J L (2010) 298.

social science. I concur with the assertion that the prevailing restrictive approach to the interpretation of Article 13(b) which suggests: "...[T]hat only too often courts have failed to provide adequate protection for children and that their zealousness not to determine the long-term interests of children has also led them to ignore their immediate interests. Whilst undertakings, judicial liaison and other provisional measures appear to provide the optimal solution to the tension between the need to protect the child and the danger of undermining the Convention, these measures are of little value unless courts ensure that they are really effective".²⁸⁰

Making the abuse of the victimized abducting parents irrelevant to an Article 13(b) defence often deprives them of the only defence available to them, rendering them powerless.²⁸¹ The strict application of Article 13(b) does not meet the needs of the victims of domestic violence and their children and the courts have been far too grudging in their application of the Article 13(b) defence. Courts should exercise more common sense in refusing to send abducting parents and children back to circumstances of domestic abuse.²⁸²

The challenges that currently plague the abducting parents who raise the grave risk defence can also be addressed by also looking into other aspects affecting international child abductions. Issues like judicial communications, judicial investigations into allegations of domestic violence, harmful effects of domestic violence on children, potential risks to the life or safety of the returning parent and/or the child following return orders, the effectiveness or enforceability of undertakings and the support for victims of domestic violence in the requesting or requested jurisdiction should also be considered in order to ensure that justice is served in all Hague Abduction cases involving domestic violence.

Consideration of the abovementioned aspects will ensure that in instances where the courts have ordered the return of the abducted children to their place of habitual residence, the courts will not place the abducting parents in an undesirable position by unrealistically believing that the abducting parents will be protected from further domestic violence upon

²⁸⁰Schuz R, *The Hague Child Abduction Convention* (2013) Hart Publishing, page 315.

²⁸¹Browne N L 'Note, Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction' 2011 *Duke Law Journal* 1202.

²⁸²Bruch (2004) *Fam LQ* 529.

their return. Furthermore, consideration of the above issues will ensure that the children who are returned to their place of habitual residence are not further traumatised for example by having to travel alone back to their habitual place of residence or erroneously being compelled to stay with the abusive left behind parent who abused them or the abducting parent.



CHAPTER 4: DIRECT JUDICIAL COMMUNICATIONS, JUDICIAL INVESTIGATIONS, UNDERTAKINGS AND RELATED MATTERS

1. Direct Judicial Communications

Direct judicial communications refer to communications between sitting judges concerning a specific case before them. These communications arise in cases where there are concurrent proceedings in different jurisdictions with the same parties. These communications can be utilised in both the requested and requesting States in Hague abduction cases.²⁸³ One of the overarching principles involving direct judicial communications is that the judge who is involved in direct judicial communications must maintain his/her independence and must respect the law of his/her State. Furthermore, in Contracting States in which direct judicial communications are utilised, the judges are required to follow certain procedural safeguards. For example, the parties who are involved in the case should be notified about the nature of such communications and there should be proper recording of such communications. The Central Authorities in the Hague Abduction cases may also assist the judges by facilitating direct judicial communications.²⁸⁴

Generally, there is extensive support for the utilisation of direct judicial communications in matters relating to child protection, including in countries considered in this thesis.²⁸⁵

²⁸³Hague Conference on Private International Law, 'Direct Judicial Communications - Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges' 2013, page 12. Available at www.hcch.net. (accessed 27 January 2016).

²⁸⁴Hague Conference on Private International Law, Direct Judicial Communications (2013). pages 12 - 13.

²⁸⁵Lord Justice Thorpe 'The case for judicial activism' pages 72 - 77 in Sloth- Nielsen J & Du Toit Z (eds) 'Trials & Tribulations, Trends & Triumphs – Developments in International, African and South African Child and Family Law' (2008) Juta. Available at <https://books.google.co.za/books> (last accessed on 22 January 2016). In 2013, the Permanent Bureau of the Hague Conference published the brochure 'Direct Judicial Communications -

Apparently, since the first case in 1996²⁸⁶ where a direct judicial communication was used, the number of cases where such communications have been taking place has grown. There are indications that the Special Commission tasked with reviewing the operation of the Hague Abduction Convention supports direct judicial communications as a valuable tool in the implementation of the Convention between member States, including in cases where there are domestic violence allegations. Furthermore, there are indications that direct judicial communications can be very beneficial for resolving some of the practical issues in Hague abduction cases and they may result in immediate resolution of cases.²⁸⁷ The legality of direct judicial communications has been considered and approved by the Court of Justice of the European Union²⁸⁸ and the Supreme Court of the United Kingdom.²⁸⁹

The objective of direct judicial communications is, among others, to deal with any lack of information that the competent judge in the requesting State may encounter about the situation and legal implications in the State of the habitual residence of the abducted child. In

Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges'. See www.hcch.net (accessed 7 April 2015).

²⁸⁶*D v B*, 17 May 1996, transcript, affirmed by a majority decision by the Quebec Court of Appeal, 27 September 1996. A summary of the decision available at <http://www.incadat.com/> (accessed 7 April 2015) - Ref. HC/E/CA 369 [17/05/1996]. See also Beaumont P R & McElevay P E, *The Hague Convention on International Child Abduction*, Oxford University Press, 1999, at page 168.

²⁸⁷See Special Commission, Hague Conference on Private International Law, Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children 2006, at page 9. Available at <http://www.hcch.net/upload/concl28sc5e.pdf> (accessed on 18 January 2016).

²⁸⁸*Purrucker v Valles Perez* (no 1) [2012] 1 FLR 903; [2011] Fam 254; [2011] 3 WLR 982 and *Purrucker v Valles Perez* (no 2) [2012] 1 FLR 925; [2011] Fam 312; [2011] 3 WLR 1040.

²⁸⁹*Re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144.

this context, International Hague Network of Judges may be roped in to assist in facilitating, among other things, the following: the prompt and safe return of internationally abducted children; the establishment of measures of protection; the establishment of whether protective measures are available for the child or the abducting parent in the requested State; the provision of information about custody or access involving the abducted child; measures for addressing domestic violence allegations; the making of interim orders; ascertaining whether the court of the requested State can accept and enforce undertakings made by the court in the requesting State; ascertaining whether the court in the requested State can issue a mirror order; confirming whether any orders were made by the court in requested State; verifying whether findings about domestic violence were made by the court in the requested State etc.²⁹⁰ Hence domestic violence is directly implicated in the judicial communication process.

There are indications that direct judicial communications operate in the best interests of children because they often result in significant time savings and better use of resources.²⁹¹ Furthermore, direct judicial communications are beneficial in child protection matters because they can achieve the following: they can assist regarding the assessment of the children's rights to be heard; improve cooperation and coordination in child protection matters; assist in promoting a consistent interpretation of child protection laws; restore family links; and assist the judges to keep abreast of country of origin laws or information.²⁹²

²⁹⁰Hague Conference on Private International Law 2013 - Direct Judicial Communications 'Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges. page 7. Available at www.hcch.com (accessed on 22 January 2016).

²⁹¹Hague Conference on Private International Law 2013, page 12. Available at www.hcch.com (accessed on 22 January 2016).

²⁹²9th European Forum on the Rights of the Child - Coordination and Cooperation in Integrated Child Protection Systems , Judicial Involvement - Brussels, 3-4 June 2015. Page 10 Available at http://ec.europa.eu/justice/fundamental-rights/files/rights_child/9th_f_j_forcada_miranda.pdf (accessed on 4 February 2016).

In the UK direct judicial communication was successfully utilised, for example, in the case of *RA v DA* [2012] NIFam9²⁹³; in the USA it was applied in the case of *Panazatou v. Pantazatos*, No. FA 960713571S (Conn. Super. Ct. Sept. 24, 1997).²⁹⁴ Furthermore, in the USA special provision is made for judicial communication in the Uniform Child-Custody Jurisdiction and Enforcement Act (1997).²⁹⁵

In view of the many positive aspects relating to direct judicial communications, the abducting parents who are victims of domestic violence can benefit considerably if all judges involved in Hague abduction matters can utilise direct judicial communications. This will ensure that some of the hardships brought about by the interpretation of Article 13 of the Convention are averted. Direct judicial communications can also benefit internationally abducted children because the children's right to be heard can alleviate some of the challenges faced by international child abductions. Furthermore, direct judicial communications can also assist in preventing the child from having to repeatedly express his or her views to various judges in different jurisdictions.²⁹⁶

2. Judicial investigations of domestic violence in Article 13 cases

Apparently, the Hague Conference on Private International Law (HCPIL) is in support of measures which will promote consistency in how domestic violence cases are dealt with in Hague abduction matters. The HCPIL also recognized that when deciding on a child abduction case, the requested judge should trust that the judicial authorities of the requesting State will take care of the due protection of the child, and where necessary the accompanying

²⁹³INCADAT Reference: HC/E/UK 1197. Available at <http://www.incadat.com> (accessed on 22 January 2016).

²⁹⁴INCADAT Reference: HC/E/US 97. Available at <http://www.incadat.com> (accessed on 22 January 2016).

²⁹⁵See section 110. Available at <http://www.uniformlaws.org/shared/docs> (accessed on 22 January 2016).

²⁹⁶Martinson D (Q.C) 'The Canadian Approach to Direct Judicial Communication: Making Concurrent Proceedings Involving the Same Family Operate Effectively' page 13. Available at <http://fredacentre.com/wp-content/uploads/2010/09/The-Hon.-D.-Martinson-The-Canadian-Approach-to-Direct-Judicial-Communication.pdf> (accessed on 27 January 2016).

parent, once the child is returned.²⁹⁷ The latter situation was considered in the Australian case of *Department of Community Services and Harris* [2010] FamCA 261, where the judge concluded (at paragraph 184) that:..."even with a well-structured legislative framework and social service agencies with responsibilities to assist victims of domestic violence and children who are exposed to it, such laws and systems may in individual cases be insufficient protection for the child...". The approach in the abovementioned case of *Department of Community Services and Harris* has been endorsed by the European Court of Human Rights in *Neulinger v Switzerland* which was discussed in paragraph 7 above. In the RSA, research has revealed that Government's efforts to effect changes in its approach to violence against women often fail on the level of implementation.²⁹⁸ As already discussed in paragraph 7 above, it appears that the approach adopted in the *Neulinger* case can be of great assistance to victims of domestic violence in Hague abduction matters.

3. Article 13 cases and insufficient recognition of the harmful effects of domestic violence on children

Previous and recent research indicates that a high proportion of the previously abducted children experienced some mental health problems and often do not get support.²⁹⁹ However, the effects of such parental abductions on abducted children differ depending on, among other things, the length of the abduction, the age of the child and on whether siblings were also abducted.³⁰⁰

²⁹⁷Hague Conference on Private International Law, Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 4-6 Judges' Newsletter On Child Protection, Vol. XVIII (2012).

²⁹⁸Artz L & Smythe D 'Case attrition in rape cases: a comparative analysis' (2007) 20 *SACJ* 158 -18.

²⁹⁹Report by Reunite International Research Unit, 'The Outcomes for Children Returned Following an Abduction' 2003, page 30. Available at http://www.reunite.org/pages/outcomes_research.asp (accessed 22 January 2016); Edleson J L 'Children's Witnessing of Adult Domestic Violence' *Journal of Interpersonal Violence*, 14 (1999); Freeman M (2014) page 7.

³⁰⁰Martinson D & Gregg M 'Cross Border Parental Child Abduction – Social Context Issues' Paper Prepared for Cross Border Child Custody Disputes – Judicial Networking and Direct

According to Professor Freeman,³⁰¹ the previously abducted children's mental health problems increase when they are returned home because of, among others, the following reasons: they struggle to find their place within their own family structure in their changed circumstances; the disturbance caused by the reunification triggers psychological problems for abducted children because they struggle with issues relating to their identity and a sense of belonging; previously abducted children often have conflicted loyalties for having spent some time with the abducting parent as their only support system, only to be returned to left a behind parent they barely remembered or a left behind parent who may be experiencing challenging feelings about the abduction; the new family composition which may include step parents or step-siblings, with which the previously abducted child should now form relationships with; and the previously abducted child may blame the left-behind parent for not finding them, and for deserting them.

A very low percentage of abducted children reported no real effects because their abductions were very short abductions or they supported the abduction or intention to abduct by the abducting parent.³⁰² The aforementioned research supports the World Health Organization's study on domestic violence in which it was stated, among others, that : “[v]iolence against women has a far deeper impact than the immediate harm caused[...] [i]t has devastating consequences for the women who experience it, and a traumatic effect on those who witness it, particularly children”.³⁰³

Therefore, to ensure that the best interests of children are promoted without any compromise, it is essential that the judiciary and every person dealing with Hague abduction cases receives training on all aspects relating to the harmful effects of domestic violence on children because that will equip them to make informed decisions. Additionally, children can be protected from the harmful effects of abduction by providing them with appropriate support and care. Though the Preamble of the Hague Convention establishes “procedures to ensure

Judicial Communication, Judicial Officers Pre-Institute, Association of Family and Conciliation Courts, May 28, 2014, Toronto, Ontario, at page 14.

³⁰¹Freeman M (2014) page 7.

³⁰²Freeman M (2014) page 35.

³⁰³WHO - Multi-country Study on Women's Health and Domestic Violence Against Women: summary report of initial results on prevalence, health outcomes and women's responses, Geneva, World Health Organization 2005, at pages viii and 8.

their prompt return to the State of their habitual residence”, the Convention does not in any way make provision for such support or aftercare. Practically, it is insufficient to simply return abducted children to their habitual place of residence because abducted children require protection from the harmful and negative effects of their abduction. The aforementioned protection can also be extended to abducted children who are not returned to their habitual place of residence.³⁰⁴

4. Effectiveness or enforceability of undertakings and mirror orders

There appear to be some challenges regarding the appropriate utilisation of protective measures ordered in conjunction with return orders in Hague Abduction cases, including the effectiveness or enforceability of undertakings and mirror orders. Undertakings are the voluntary promises or guarantees made by the left-behind parent promising not to endanger the safety of the child or the abducting parent and are usually attached to an order of return.³⁰⁵ For example, the left behind parent may agree to an undertaking to pay for the return transport of the child and abducting parent to place of habitual residence, or agree to pay maintenance or rent for the children and/or the abducting parent.

In order to ensure that the undertakings are enforceable in the requested State, the left behind parent may be required to have the conditions in the undertakings registered in similar terms in the child's State of habitual residence.³⁰⁶ These replica orders are referred to as mirror orders. Courts have, for example made return orders subject to the enactment of mirror orders in the UK cases of *Re W. (Abduction: Domestic Violence)*³⁰⁷ and in *Re F. (Children) (Abduction: Removal Outside Jurisdiction)*³⁰⁸ In the RSA undertakings and mirror orders were utilised in, among others, the cases of *Sonderup v Tondelli*³⁰⁹ and in *Central Authority v*

³⁰⁴Freeman M (2014) page 37.

³⁰⁵Edleson JL, Lindhorst T, Mehrotra G et al (2010) at page 254; Brown-Williams K (2011) 66.

³⁰⁶Edleson J L, Lindhorst T, Mehrotra G et al (2010) at page 254 - 259; Brown-Williams K (2011) 66.

³⁰⁷[2004] EWHC 1247, [2004] 2 FLR 499. INCADAT cite: HC/E/ UKe 599.

³⁰⁸[2008] EWCA Civ. 842, [2008] 2 F.L.R. 1649. INCADAT cite: HC/E/UKe 982.

³⁰⁹2001(1) SA 1171 (CC), INCADAT cite: HC/E/ZA 309. The Constitutional Court demanded a lot of undertakings from the left behind parent. The undertakings related to,

H.³¹⁰ In the USA undertakings were considered in the Court of Appeals for the First Circuit case of *Danipour v McLarey*.³¹¹

In some cases where grave risk of harm was raised as a defence, the courts have tended not to reject the left behind parent's application, but addressed the issue of risk through the imposition of conditions and the giving of undertakings. For example in the RSA case of *Penello v Penello* the court found that the undertakings made by the child's father (left behind parent) would lessen the mother's (abducting parent's) concerns regarding potential hardship that their daughter might suffer if ordered to return to the USA.³¹²

However, there are indications that such undertakings and mirror orders are in many instances unenforceable³¹³ or that the left behind parent failed to comply with undertakings. Furthermore, there are indications that undertakings contribute to the delays in the finalization of return cases and in some instances the undertakings can also create unreasonable conditions for the left behind parent.³¹⁴

The fact that protective measures were issued by the court in the requesting State is not a sufficient guarantee that abducted children will be safe once they are returned to their habitual residence because: first, courts of the requesting State have no further opportunity to safeguard the interests of the abducted children once they leave their jurisdiction; and second, courts of the requesting State have no legal authority to follow up on the implementation of

among others, the dropping of criminal charges against the abducting parent, maintenance and other ancillary expenses the abducting parent and her and child were likely to experience upon their return. The abducting parent also had to obtain an order from the Supreme Court of British Columbia in the same terms as the undertakings he had given in the RSA.

³¹⁰2008 (1) SA 49 (SCA), .INCADAT cite: HC/E/ZA 900.

³¹¹286 F3d 1 (1st Cir 2002).

³¹²See para 62.

³¹³Nicholson CMA, page 276. See also the USA case of *Danipour v McLarey* 286 F3d 1 (1st Cir 2002) where the Court of Appeals for the First Circuit cautioned against reliance on undertakings for the protection of the child, because they are often unenforceable.

³¹⁴Brown-Williams K (2011) 66 - 67. For example in the UK case of *Ro v. Ro* of 26 March 1997. INCADAT cite: HC/E/IL 832, the left behind parent failed to deposit the money required by the court.

undertakings made, but the requested State can assist with regard to the enforceability of the undertakings by issuing mirror orders.³¹⁵

In view of the fact that undertakings in Hague abduction applications are temporary arrangements and not final decisions on custody and economic issues, it is crucial that courts should take into consideration the fact that there may be disparities in power between the abducting parents and left behind parents where domestic violence was the cause of the abduction. Therefore, there should be absolute certainty regarding the safety of the returning parents and/or the children following the return orders. Co-operation between the contracting States is a key element in ensuring that there's successful implementation of the terms of undertakings and mirror orders, particularly with regard to the safety of the abducting parents and their children. If such cooperation is not present, the issuing of undertakings will be useless and may even endanger the lives of the abducting parents and the children.

5. Potential risks to the life or safety of the returning parent and / or the child following return orders

There have been situations where courts handling Hague abduction matters have decided that the abducting parent's evidence of domestic violence does not support her case. Furthermore, there have been cases where the courts held that violence perpetrated against the abducting parent did not create any risk of harm to the child involved despite evidence of more than thirty years indicating the risks which domestic violence poses to children. In some cases courts minimized the violence because they failed to determine whether the "minimal" violence is part of a larger pattern of coercive power and control on the part of the left behind parent. Furthermore, courts in the requesting State would return the abducted child to the requested State's foster care system, believing that the requested State will resolve the problems. However, sending the abducted child to the requested State's foster care system is "intolerable" from the child's perspective. In some instances courts in the requesting State simply looked at the laws of the requested State without considering the

³¹⁵Nicholson CMA, page 276. See also for example the RSA case of *Penello v Penello* where the left behind parent had to obtain a mirror order in which he undertook to withdraw the arrest warrant for his wife in the USA and that he would not institute legal proceedings against his wife relating to her abduction of their child (see paragraphs 149 C-E).

implementation/application of those laws and trusted that the requested State would protect the victims.³¹⁶

In terms of Article 20 of the Convention the return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. The novel approach to the provisions of Article 20 is that it can be interpreted to include abducting parents (who are primary care-givers) fleeing from domestic violence because domestic violence is a human rights issue. According to the Perez Vera Report, the fundamental principles of human rights referred to in Article 20 “...must not be invoked any more frequently in international cases...than they would be in their application to purely internal matters...Otherwise the provision would be discriminatory in itself, and opposed to one of the most widely recognised fundamental principles in internal law.”³¹⁷ I submit that the Perez Vera Report did not explain Article 20 extensively.

In instances where the abducting parent is a primary care-giver, I submit that it is a violation of the fundamental principles of human rights to send a domestic violence victim's child back to a place where his/her parent's life might be in danger because that parent might, because of safety concerns, be impeded from or will not be able to exercise some of his/her parental rights, for example visitation rights. Furthermore, it is a violation of Article 20 of the Hague Abduction Convention to make a domestic violence victim litigate custody in a place where her safety is at risk. Nevertheless, research indicates that no court has yet found that returning a child to a place where his/her mother's life is endangered violates the mother's fundamental human rights.³¹⁸

6. Lack of adequate support for victims of domestic violence in the requesting or requested jurisdiction

³¹⁶Weiner M H & Knight P H - Office for the Prevention of Domestic Violence Child Abduction: Domestic Violence or a Flight to Safety?' Bulletins - Summer 2013. Available at http://www.opdv.ny.gov/public_awareness/bulletins/summer2013/childabduction.html (accessed 6 November 2015).

³¹⁷ Perez-Vera Report, 462.

³¹⁸Weiner M H & Knight P H (2013).

There are indications that abducting parents and their children often experience a lack of support in general, including lack of support from the government. According to Professor Taryn Lindhorst (Professor of Social Work, USA) who is currently assisting to develop new legislation to protect abused women, there are several barriers that prevent abducting parents (mothers) from getting help. She indicated that “Many women in abusive situations abroad don’t speak or read the country’s primary language, and may not have access to legal protections, like a restraining order, that they would in the USA.” The Professor also indicated that “Once a woman is in the United States, expenses associated with mounting a legal defence and getting evidence from another country, along with lawyers who are unfamiliar with transnational domestic violence, can add complications.”³¹⁹

In some contracting States, for example in the USA, abducting parents who lose their cases against the left behind parents are compelled to pay the left behind parent’s exorbitant legal costs even if the abducting parent fled in good faith and can prove the abuse on a preponderance of evidence. In this way, many of the abusive left behind parents turn the Hague Abduction Convention into a powerful tool against the abducting parents (intimidatory litigation).³²⁰ In South Africa studies show that Government’s attempts to effect changes in its approach to violence against women regularly fail at the level of implementation.³²¹

To ensure that the human rights of abducting parents and their children are protected in both the requesting and requested States, abduction support services must be widely publicised and made available to them. To ensure accessibility, the aforementioned services should be available in various forms including remote access through the internet. Most contracting States would argue about the funding of the aforementioned proposal, but some international co-ordinated effort in this regard should be possible, even on a modest scale, and should be immediately investigated.³²²

³¹⁹Princing M ‘Professor help craft US Bill to aid women fleeing abuse’. Available at www.hsnewsbeat.uw.edu/story/professor-helps-craft-us-bill-aid-women (accessed 6 November 2015).

³²⁰Weiner M H & Knight P H (2013).

³²¹Artz L & D Smythe ‘Case attrition in rape cases: a comparative analysis’ (2007) 20 *SACJ* 158-181.

³²²Freeman M (2014) page 38.

7. Conclusions

The global prevention of domestic violence should entail, among others, women's empowerment and their enjoyment of human rights.³²³ In this chapter it is clear that judicial communications, undertakings and mirror orders are tools used by Convention courts to address allegations of domestic violence falling below the grave risk standard. It appears that undertakings are time-consuming and complicated, and they often involve conflicting expert testimony which may lead to courts falling prey to cultural stereotyping. The acceptance of undertakings should not be viewed as a panacea since without mirror orders in the state of habitual residence they may not be effectively enforceable, and even when they are enforceable, they are routinely broken.

The inability of some abducting parents to find and afford legal assistance can result in widely varying results and disparities where appropriate evidence of alleged abuse perpetrated by the left behind parent is critical and time is critical. Therefore, there should be provision for adequate time in cases where domestic violence is alleged, for example to allow the abducting parent to gather evidence.

In view of the conclusions set out above, I submit that Article 13 and the legal concepts in the Hague Abduction Convention need overhauling because in the context of domestic violence they violate the rights of the abducting parents and their children. This view is shared by most private international law experts and other stakeholders, hence the recent meeting (from 21-23 January 2016) convened by the Hague Conference on Private International Law, to develop a Guide to Good Practice on the interpretation and application of Article 13(b) of the Hague Convention, including the relationship between domestic violence and Article 13.

³²³UN WOMEN 'Focusing on Prevention to Stop the Violence'. Available at <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/prevention> (last accessed on 22 January 2016).

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

1. Introduction

This chapter will highlight the most pertinent conclusions reached in the preceding chapters of this thesis. Furthermore, this chapter will propose certain recommendations which may assist in ensuring that the scourge of domestic violence is not perpetuated through Hague Abduction cases. Additionally, recommendations will propose measures to improve the manner in which victims of domestic violence are treated in Hague Convention cases.

2. Summation

In chapter 2 the aim was to explore the key legal concepts which govern international child abductions. The concepts discussed included: elements of a prima facie case in Hague convention cases; wrongful removal or retention of child; habitual residence; prompt return principle; rights of custody and the role of the best interests of the child. This chapter established and concluded that some of the provisions of the Hague Convention are antiquated and may require some revision because in many instances they operate against the victims of domestic violence. Furthermore, in many cases the provisions of the Hague Convention give the left behind parents the benefit of the doubt over the abducting parents and their children. For example, it was explained as to how the prompt return principle and considerations relating to the determination of habitual residence disadvantage the victims in Hague Abduction applications. Additionally, it was explained how the strict application of the Convention may in some instances compromise children's rights.

The main objective of chapter 3 was to explore the definition and dynamics of domestic violence, the international and regional legal framework governing domestic violence and Article 13 of the Convention. This chapter highlighted domestic violence legislation in the RSA, USA, Switzerland and UK. Furthermore, this chapter dealt with the due diligence principle which has risen to prominence in domestic violence jurisprudence. It was concluded in this chapter that in view of the international treaties discussed and the aforementioned States' legislation on domestic violence, those States are compelled to ensure that there is full implementation of the law governing domestic violence, without any

compromise. Domestic violence, it was argued, is now rightly considered a core human rights concern.

The aim of chapter 4 was to explore the following aspects vis- a- vis Article 13(b) of the Hague Convention: direct judicial communications; judicial investigations regarding domestic violence; insufficient recognition of the harmful effects of domestic violence on children; lack of awareness of social science evidence of the links between spousal and child abuse; potential risks to the life or safety of the returning parent and / or the child following return orders; appropriate use of protective measures (e.g undertakings); lack of adequate social or governmental support for victims of domestic violence in the requesting or requested jurisdiction; and a lack of family, social and economic support (including legal aid or access to justice) for the returning parent in the requesting jurisdiction when she or he has been a victim of domestic violence.

It was contended in chapter 4 that the practical application of judicial communications and judicial investigations are not operating in favour of all domestic violence victims in Hague Abduction cases. Furthermore, in many instances there is lack of governmental, social, economic and legal support to victims of domestic violence in Hague Abduction matters, not only in the requested States, but also in the requesting States.

Chapter 4 concludes that that judicial communication in Hague Abduction matters can go a long way in alleviating the challenges faced by domestic violence victims. Furthermore, it was argued that the use of undertakings if utilised effectively, can assist the victims of domestic violence and affected children to live normal lives after finalisation of the Hague Abduction case.

3. GENERAL RECOMMENDATIONS

In view of the conclusions reached in the chapters 1 to 4 above, it is clear that domestic violence in Hague abduction matters requires further attention. The provisions of Article 13 of the Convention are lacking and require augmentation by an additional Protocol and the addition of new mechanisms to the protective measures. Apparently the Convention is not construed uniformly throughout the 90 ratifying States and in many instances it operates against the rights and interests of domestic violence victims. It was not contemplated more than 35 years ago, when the Convention was drafted, that abducting parents will include

domestic violence victims. Hence there is tension between the interest in discouraging international child abduction and that of protecting victims of domestic violence.

Considering that the Hague Convention was enacted before awareness of the scourge of domestic violence became rife and prior to the advanced scientific psychological research on the effects of domestic violence on human beings, the provisions of the Convention need augmentation by closing the loopholes that may give abusive left behind parents the benefit of the doubt over the abducting parents and their children. This can be achieved by inserting a domestic violence defence in the Convention by means of a Protocol. However, any proposed change to the Convention must work within three limitations. First, a proposal should not change the nature of the Convention such that a court where a Hague application is brought must resolve issues relating to a final custody determination. Second, to avoid forum shopping, any proposed solution should try to maintain uniformity in the enforcement of the Convention. Third, any proposed change should refrain from infringing on the rights of the left-behind parents.

The inclusion of an explicit domestic violence defence in the Convention will ensure a consistent and predictable body of international law and will send a strong message that the international community will not tolerate domestic violence. Furthermore, judges would be compelled to give full effect to the Convention's intent and would be forced to be consistent. Furthermore, the best interests of children will be clearly covered because an explicit domestic violence defence would alleviate the fundamental problem of recognizing domestic violence perpetrated upon an adult care-giver as a harm to children.

Though an explicit domestic violence defence might lengthen court proceedings, the interests of the abducted children and the abducting parent's safety are more important than procedural efficiency. Member States can in turn revise implementing legislation; educate mothers about transnational issues; ensure mother and children's safety if returned; provide support and resources to mothers and educate lawyers and judges.

A domestic violence defence may be criticized on the basis that theoretically it justifies the abduction. Nevertheless, it is argued here that this is in practice not the case, because under a domestic violence defence, victims would still have to litigate the custody issues; they would not be able to take a child away from the other parent without having to go to court. It will increase fair and just outcomes. Both parents will still have their day in court. What will be at

stake is which party chooses the custody forum. A domestic violence defence acknowledges that victims who have first proven the existence of domestic violence should have the right to choose the forum where they feel safest. By increasing the victims' security, courts can bargain away custody rights for physical safety. Batterers will know that they cannot easily manipulate the courts and the judges will be in better positions to come to fair and just custody decisions.

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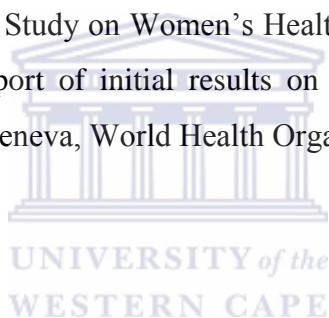
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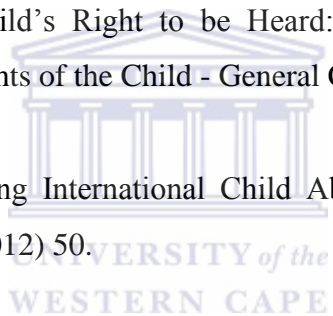
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