Appendix A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VIERA HULSH, formerly known as VIERA WISTEROVA,	)	
Petitioner,	)	No. 19 C 7298
v.	)	Judge Virginia M. Kendall
JEREMY HULSH,	)	
Respondent.	)	

MEMORANDUM ORDER AND OPINION

Respondent Jeremy Hulsh removed his sons, H.P.H. and T.S.H. (ages eight and six), from the territory of Slovakia on or about October 24, 2019 without the consent of the children's mother, Petitioner Viera Hulsh. (Tr. at pp. 73–75, 360.)[1] On November 5, 2019, Viera Hulsh filed this petition to regain custody of her children. A Slovakian court had previously declared that the children—both of whom were born in Israel—made their place of habitual residence in Slovakia. (*Id.* at p. 76; Petitioner Ex. 9.) Jeremy brought the children to Chicago, Illinois, where they have resided ever since.

The first concern for the Court was to ensure that the children were in a safe and nurturing environment and that they would not be harmed by the ongoing litigation. As the attorneys gathered evidence for the hearing, the Court worked with the parties to create a custody agreement that would be in the children's best interest while ensuring access to both parents. The Court is grateful to the generous service of guardians ad litem Bruce Boyer and Stacey Platt from Loyola University Chicago School of Law's Civitas ChildLaw Center. They tirelessly came on board the case during challenging times—first, the holiday season and second, a world pandemic—and they

[1] The Court uses the abbreviation "Tr." to refer to the transcript of the evidentiary hearing, docket number 165.

continued to meet with the children, their monitors, and their parents to report to the Court regularly. They ensured that the children were enrolled in school, had regular contact with both parents, and that no discussion of this litigation was made in their presence. Their service enabled the Court to focus on the legal issues and the evidentiary hearing, and as such, they deserve this Court's gratitude for their professionalism and service. It should be noted that one significant factor that came from the guardians ad litem is that both parents love their children and wish for their best.

Shortly following the children's arrival in the United States, Viera filed the instant Petition pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") seeking to have the children returned to Slovakia. (Dkt. 1.) Jeremy does not contest that he abducted the children. (*See* Tr. at p. 644, wherein counsel for Respondent refers to Jeremy's action as a justified abduction.) Instead, he invokes two treaty exceptions, which if established, would permit the Court to decline to return the children to Slovakia. First, he posits that the Article 13(b) exception applies, claiming that his children would face a grave risk of physical or psychological harm upon returning to Slovakia because he believes that Viera's paramour, Michal Svarinksy, has pedophilic tendencies and has exhibited "grooming" behavior toward the children. Second, he raises an Article 20 defense, arguing that returning the children to Slovakia would violate the fundamental principles of the United States relating to the protection of human rights and fundamental freedoms.

For the reasons set forth below, the Court finds that Jeremy wrongfully removed H.P.H. and T.S.H. from Slovakia, the country of their habitual residence, in violation of Article III of the Convention and that Jeremy has not met his burden to establish any treaty exception. Accordingly, the Petition (Dkt. 1) is granted.

LEGAL STANDARD

The United States and Slovakia are both signatories to the Convention. Hague Conference on Private Int'l Law, Convention of 25 Oct. 1980 on the Civil Aspects of Int'l Child Abduction, Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24. Congress implemented the Convention domestically via the International Child Abduction Remedies Act ("ICARA"). *See* 22 U.S.C. §§ 9001–11. The Convention entitles a parent who believes her children have been wrongfully removed from the children's country of habitual residence to petition a federal court to order the children returned. *Id.* The Convention and the implementation statute only allow federal courts to determine whether children have been wrongfully removed and whether any exception applies; courts are not permitted to decide the merits of any underlying custody claims. 22 U.S.C. § 9001(b)(4).

The burden lies with the petitioner in a wrongful removal action to establish by a preponderance of the evidence that the children have been wrongfully removed within the meaning of the Convention. 22 U.S.C. § 9003(e)(1). A removal is wrongful under the Convention if:

> (a) it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal . . . ; and
> (b) at the time of removal . . . those rights were actually exercised . . . or would have been so exercised but for the removal . . . .

The Hague Convention on the Civil Aspects of International Child Abduction, art. 3, Oct. 25, 1980, T.I.A.S. No. 11,670, 1342 U.N.T.S. 89. If the petitioner establishes a *prima facie* case of wrongful removal under Article 3, the burden shifts to the respondent to prove that a treaty exception applies. 22 U.S.C. § 9003(e)(2). The Convention provides for five distinct exceptions. *See Chafin v. Chafin*, 568 U.S. 165, 169 (2013) (explaining each of the Convention exceptions). A respondent bears the burden of establishing an Article 13(b) or Article 20 exception by clear and convincing

evidence. 22 U.S.C. § 9003(e)(2)(A). If no exception applies, the federal court must order the prompt return of wrongfully removed children to their country of habitual residence. *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020).

FINDINGS OF FACT

Having heard testimony in open court over the course of five days,[2] having received documents into evidence, and having heard argument from both parties' counsel, the Court makes the following findings of fact.

I. The Hulsh Family

Viera Hulsh, née Wisterova, is 42 years-old and is a citizen of both Slovakia and Israel. (Tr. at p. 15.) She is an entertainment moderator and presenter on Slovakian television and radio programs. (*Id.*) She resides in Bratislava, Slovakia. (*Id.*)

Jeremy Hulsh is 41 years-old and is a citizen of Israel and the United States. (Tr. at p. 155.) He currently resides in Chicago.

Together, Jeremy and Viera had two children, H.P.H. and T.S.H, both of whom were born in Tel Aviv, Israel. (Tr. at p. 16.) H.P.H. was born in October, 2011. (Tr. at p. 16.) T.S.H was born in April, 2014. (*Id.*) Both children hold American, Israeli, and Slovakian passports. (Tr. at pp. 35–36.)

[2] The Court heard testimony on February 18–21 and the hearing was expected to reconvene by agreement of the parties in March. Unfortunately, the evidentiary hearing was interrupted due to the COVID-19 pandemic. The Court is aware that the Convention recommends that courts decide such cases within six weeks of the commencement of proceedings. The Court wishes it could have complied with that timeline here, but given the extraordinary public health circumstances, this delay was unavoidable. Once the situation stabilized. the Court notified the parties as soon as it was permitted to conduct a hearing in person and reconvened the hearing on June 17-18, 2020, provided for post-hearing briefings with a transcript, and issued this Opinion as expeditiously as possible.

II. Relocation from Tel Aviv and Life in Bratislava

In May of 2014, five weeks after T.S.H.'s birth in Israel, the parties and their children relocated from Tel Aviv to Bratislava. (Tr. at pp. 16–17.) They made this move because they did not think that Israel was a safe place to live and because Viera had better career opportunities as a radio and television presenter in Slovakia. (Tr. at p. 17.) Jeremy contests the notion that anyone ever "moved" to Bratislava, but the Court finds Viera's interpretation of the events to be more persuasive, as described in further detail below. Before the family flew to Bratislava, they vacated the small apartment that they rented in Tel Aviv. (Tr. at pp. 18–19.) They packed up their belongings, shipped many of them to Bratislava, and kept some items in a storage unit in Tel Aviv. (*Id.*) By the end of 2014, they sold or gave away almost all of their belongings in Israel with the exception of two boxes that remained at a family member's home. (Tr. at p. 19.) They stopped paying rent for the Tel Aviv apartment in August, 2014. (Tr. at p. 270.) After taking the initial flight to Bratislava from Tel Aviv in May, 2014, the children only spent two to three weeks in Israel for the remainder of 2014. (Tr. at p. 266.) Also in 2014, H.S.H., who was then two-and-a-half years-old, enrolled in "preschool and kindergarten" in Bratislava at the "Bambi Kindergarten." (Tr. at p. 20.) Both boys also saw a pediatrician in Slovakia beginning in 2014. (Tr. at pp. 21–22.) Jeremy, Viera, and the boys lived in a two-bedroom apartment beginning in 2014, which was located at Bradacova 6 in Bratislava. (Tr. at p. 25.)

In 2015, the children spent a total of 56 days in Israel over four trips. (Tr. at p. 268:22–24.) During that year, H.P.H. attended a Jewish preschool and kindergarten in Bratislava called Lauder Gan Menachem. (Tr. at p. 26.) The family continued to live at the apartment at Bradacova 6 in Bratislava. (Tr. at p. 26:7–11.)

In 2016, the children spent just twenty days in Israel over three trips, during which they stayed with family. (Tr. at pp. 32, 271–72.) The family continued to live at the same Bratislava apartment. (Tr. at p. 31.) H.P.H. attended Lauder Gan Menachem again in 2016 and took swimming classes in Bratislava in 2016. (Tr. at pp. 30, 273–74.) Both children attended gymnastics courses in Bratislava. (Tr. at p. 31.) H.P.H also saw a speech therapist in Bratislava that year. (Tr. at p. 31.) Viera and Jeremy's relationship began to deteriorate in or around 2016; Viera consulted a divorce lawyer for the first time in 2016. (Tr. at p. 142.)

Before Viera and Jeremy's relationship began to deteriorate, the parties had been discussing the possibility of moving to the United States since approximately 2014. (Tr. at pp. 143, 446.) Indeed, these discussions appear to have been quite serious, given that Viera went through the process of getting a "Green Card," which she was able to obtain in 2016 through the sponsorship of her brother-in-law, Oren Hulsh. (Tr. at p. 370.) Jeremy had conducted research into neighborhoods, schools, and possible employment in Southern California, including taking a trip there in November 2016 for those purposes. (Tr. at pp. 418–20.) Viera also conducted some research into schools for the children and homes in the greater Los Angeles area and in New York. (Tr. at pp. 117, 455.)

The children spent a total of eight days in Israel in 2017, all at the very beginning of the year, and they have not returned to Israel since. (Tr. at pp. 273–74.) The family had traveled to Israel in December 2016 in part because Viera and Jeremy intended to file for a religious divorce, or a "Get." (Tr. at p. 33.) On January 8, 2017, Viera returned to Slovakia with the children without having received a Get. (Tr. at pp. 34, 488.) Viera considered herself separated from Jeremy as of January 8, 2017. (Tr. at p. 50.) Given that the parties had separated, the record is replete of any

suggestion that the parties continued discussing moving to the United States after January 2017. Indeed, Viera relinquished her Green Card on August 14, 2017. (Tr. at p. 115.)

Both children attended the "Fantastika" school in Bratislava in 2017. (Tr. at pp. 51–52.) They both attended swimming classes, gymnastic classes, and Sunday Jewish school in Bratislava that year. (*Id.*) H.P.H. also attended a weekly climbing school and regular "sand therapy" sessions in Bratislava in 2017. (Tr. at pp. 52–54.) H.P.H. also saw a pediatric psychiatrist in Bratislava in 2017. (Tr. at pp. 54–55.)

Also in 2017 (and through to this present date), Viera had a Slovakian paramour named Michal Svarinsky, with whom she had been having an affair prior to the family's December 2016 trip to Israel. (*See* Tr. at pp. 40, 44, 494.) According to Viera, Jeremy threatened to kill Svarinsky during a confrontation in January of 2017 in Israel. (Tr. at p. 44.) Jeremy believes that Mr. Svarinksy has engaged in sexually inappropriate grooming behavior toward H.P.H. and T.S.H. (Tr. at p. 341.) Jeremy's central piece of evidence of Svarinsky's sexually inappropriate behavior is a WhatsApp message thread between Viera and Svarinsky from December 28th, 2016 that, translated from the original Slovak, reads as follows:

> Viera: How come you are up?
> Svarinsky: Seriously?
> Svarinsky: I jerked off
> Viera: And I caught you
> Svarinsky: But I stopped
> Viera: Well, go on ;-)
> Svarinsky: He is here next to me, I cannot
> Svarinsky: He put his legs on me and that's it
> Svarinsky: I am going to the bathroom :-)
> Viera: Ok
> Svarinsky: Wow
> Svarinsky: I would put it to your mouth
> Viera: I would love it very much
> Svarinsky: I am done

(Respondent Ex. 115 at p. 5589.) It is undisputed that the "he" to whom Svarinsky refers in this thread is Svarinsky's then-nine year-old son. (Tr. at p. 101.) Jeremy also believes that a WhatsApp message from Svarinsky to Viera that reads "good night and say hello to these sweet smelling boys from the gentleman with the strange lamp" (Respondent Ex. 115 at p. 5505) suggests that Svarinsky is disposed to pedophilia or was otherwise engaged in grooming behavior.[3] Having reviewed these messages, Jeremy has spent the last few years learning about grooming behavior and attempting to educate his children about pedophilia and sexual abuse because he believed that his children needed to be educated about the risk he believed Svarinksy posed to them. (Tr. at p. 364.) Jeremy instructed his children on grooming, boundaries, and sexually inappropriate behavior through the use of children's books on the subject. (Tr. at p. 364.)

In 2018, the boys continued to attend the Fantastika School in Bratislava where they lived with Viera at Viera's father's apartment. (Tr. at p. 56:11–18.) That year, the boys also attended ice skating class, gymnastics class, swimming class, and "pony calming" sessions, all in Slovakia. (Tr. at pp. 56–57.) Both boys also saw a psychotherapist in Slovakia that year. (Tr. at p. 58.)

In 2019, Viera and the boys (by then, ages seven and five) continued living in Viera's father's apartment in Bratislava. (Tr. at p. 59:9–13.) The boys attended a new school in Bratislava starting in September of 2019, close to Viera's father's apartment. (Tr. at p. 61:19–23.) They continued many of the same extracurricular activities that they had engaged in during prior years. (Tr. at pp. 64:22–65:5.) The parties obtained a legal divorce in Slovakia in 2019. (Petitioner Ex. 1 at p. 2.)

[3] The Father's response to interrogatory number five lists 150 WhatsApp messages from Svarinsky that he believes demonstrate pedophilia or grooming behavior (Petitioner Ex. 44 at pp. 14–18), but the two threads referenced above were discussed the most during the evidentiary hearing.

On October 24, 2019, Jeremy was exercising his parenting time under the supervision of Viera's father. (Tr. at p. 73:9–18.) Viera came to understand through a series of calls and emails that her father had lost track of Jeremy and the children and that Jeremy had taken the children to the Tatras Mountains region of Slovakia. (Tr. at pp. 73–74.) In fact, Jeremy had taken the children with him via car to Hungary, took them on a private jet to London, flew them from London to Toronto on a commercial flight, and drove them to Chicago, all without Viera's knowledge or consent. (Tr. at pp. 74–75, 499; Dkt. 30 at pp. 24–25.) The instant Petition followed shortly thereafter.

III. Hague Proceedings in Israel and Slovakia

In June of 2017, Jeremy filed a child abduction case under the Convention in Slovakian courts, demanding that the children be returned to Israel. (Petitioner Ex. 7.) According to Viera's lawyer, Anna Niku,[4] the Slovakian court held a hearing that took place over the course of two days, both parties were represented by counsel at this hearing, and both parties presented evidence to the court. (Tr. at pp. 189–91; *see also* Petitioner Ex. 9, the Slovakian district court opinion.) Jeremy, who does not speak Slovak, was provided an interpreter throughout the proceedings. (Tr. at pp. 194–95.) On January 8, 2018, the Slovakian district court issued a written ruling (it also issued an oral ruling to the same effect on August 17, 2017), in which the court found that Slovakia had been the children's place of habitual residence and dismissed Jeremy's petition. (Dkt. 92-5; Petitioner Ex. 9.) Jeremy, through counsel, then appealed the district court's decision to the regional appellate court. (Tr. at 193–94; Petitioner Ex. 10.) The appellate court, with a panel comprising three judges, none of whom Jeremy alleges had any bias against him, upheld the

[4] The Court considers Niku's testimony only as a fact witness regarding the Hulsh cases in Slovakian courts. Viera proferred Dr. Niku as an expert in Slovakian family law, (Tr. at p. 173) but given that she is also Viera's lawyer in Slovakia, the Court has serious doubts about her impartiality and reliability as an expert.

decision of the district court. (Dkt. 92-7; Petitioner Ex. 12.)[5] Jeremy then appealed that decision to the Constitutional Court of Slovakia, which also denied the appeal, finding the appeal "manifestly unfounded." (Petitioner Ex. 13.) He further appealed to the European Court of Human Rights, which found no evidence that the Slovakian courts misapplied the Convention or otherwise violated Jeremy's human rights. (Dkt. 30 at ¶¶ 58–59; Petitioner Ex. 15.)

ANALYSIS

I. *Prima Facie* Case

Article III of the Convention requires the Court to make the following findings to determine whether Viera has made out a *prima facie* case of wrongful removal. *See Redmond v. Redmond*, 724 F.3d 729, 737–38 (7th Cir. 2013). First, where were the children "habitually resident" as of October 24, 2019, the date of the removal and retention? Second, did the removal and retention breach Viera's custody rights under the law of the country in which the children were habitually resident? Third, was Viera exercising her custody rights at the time of removal and retention? The Court addresses each of these questions in turn.

a. Habitual Residence

As outlined above, the Slovakian court system, as affirmed by the European Court of Human Rights, has already ruled that Slovakia was the children's place of habitual residence as of 2014. Before reaching the merits of the habitual residence question, the Court first considers whether to give preclusive effect to the Slovakian district court's judgment regarding habitual residence. Viera's contends that the issue of the children's habitual residence was already litigated in Slovakian courts and that this Court should give that determination preclusive effect. Jeremy

[5] Jeremy alleges that Judge Patricia Zeleznikova was biased in favor of Viera because of Dr. Niku's previous representation of Zeleznikova, but Zeleznikova was not a judge in any of the Hague proceedings in Slovakia. (Petitioner Ex. 12 at p. 28.)

contends that even if issue preclusion might normally apply in this situation, this Court cannot give preclusive effect to the judgment of a foreign court system that he contends fails to protect fundamental human rights.

Federal courts "should generally give preclusive effect to [a] foreign court's finding as a matter of comity." *United States v. Kashamu*, 656 F.3d 679 (7th Cir. 2011). Indeed, "American courts apply the American doctrine of res judicata even to a foreign judgment of a nation . . . that would not treat an American judgment the same way." *Gabbanelli Accordions & Imports, LLC v. Gabbanelli*, 575 F.3d 693, 697 (7th Cir. 2009).[6] The doctrine of issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). Issue preclusion applies when 1) the issue sought to be precluded is the same as that involved in prior litigation, 2) the issue was actually litigated in the prior litigation, 3) determination of the issue was essential to the final judgment in the previous litigation, and 4) the party against whom issue preclusion is invoked in the current action was fully represented in the prior action. *Matrix IV, Inc. v. Am. Nat'l Bank & Trust Co. of Chi.*, 649 F.3d 539, 547 (7th Cir. 2011).

Here, the habitual residence issue before the Slovakian court that ruled on Jeremy's Convention petition was the place of the children's habitual residence as of January 8, 2017, the date on which Jeremy alleged that the children were wrongfully removed from Israel. (Petitioner Ex. 9 at ¶ 24.) The habitual residence issue before this Court, by contrast, is the location of the children's habitual residence as of October 24, 2019, the date on which Jeremy removed the children from Slovakia and brought them to the United States. *See* The Convention, art. 3(a)

[6] Jeremy contends that the Slovakian courts' habitual residence determination should not be granted comity because the Slovakian court system is corrupt, as explained in more detail in Section III of this Opinion.

(A removal is wrongful if it was in breach of the laws of the country in which the child "was habitually resident immediately before the removal or retention."); *Monasky*, 140 S.Ct. 719 at 727 ("The place where the child is at home, *at the time of removal or retention*, ranks as the child's habitual residence.") (emphasis added). Because the instant Petition pertains to a different allegedly wrongful removal, this Court must make an independent determination about the children's habitual residence at the time of that second removal. The children's habitual residence on October 24, 2019 is not the same issue that was litigated in the Slovakian Hague proceedings, so the Slovakian Hague decision has no preclusive effect. The Court must make its own habitual residence determination.[7]

The Convention does not define the term "habitual residence." *Monasky*, 140 S.Ct. at 726. The Supreme Court defines the term as the "place where the child is at home, at the time of removal or retention." *Id.* Determining where a child is at home is a fact-driven inquiry, that requires courts to use common sense and consider the unique circumstances of each case. *Id.* at 727 (citing *Redmond*, 724 F.3d at 744). Parents' intentions and circumstances pertaining to the parents, like their place of work, are relevant considerations in this inquiry, especially when the children at issue are too young to have acclimated to a particular environment. *Id.* at 727. "No single fact, however, is dispositive across all cases." *Id.*

The facts of the instant case lead to the inescapable conclusion that at the time of their removal from Slovakia by their father, H.P.H. and T.S.H. were "at home" in Slovakia and no place else. Both boys attended school in Slovakia. They participated in a myriad of extracurricular

[7] Of course, if two removal dates were very temporally proximate, it is possible that a court could find two distinct Convention cases to present precisely the same issue. But the Court need not reach the question of how close those dates would need to be to present the same issue. Here it is enough to note that much can change over the course of nearly three years, especially considering that those three years made up a substantial percentage of the children's lives up to that point.

activities in Slovakia. They saw a pediatrician in Slovakia. They saw a psychotherapist in Slovakia. Their mother worked in Slovakia. They lived in their grandfather's apartment in Slovakia.

In T.S.H.'s case, he had never known a home other than Slovakia. By the Court's arithmetic, T.S.H. spent the first five weeks of his life in Israel and since then has spent just over 100 days in that country. Before Jeremy removed T.S.H. from Slovakia late last year, T.S.H. had not visited Israel since January, 2017. T.S.H., a five-year-old, could hardly have been at home in a country he had not visited since he was two years-old. And before Jeremy brought T.S.H. to Chicago late last year, T.S.H. had never been to the United States. (Tr. at p. 500:10–11.) A five year-old child is certainly not at home in a country to which he has never been. T.S.H. has also visited a few other countries with his family on short vacations, including Austria, Hungary, and the Maldives, but he is certainly not at home in any of those places. (Tr. at p. 418.) Slovakia is the only country in which T.S.H. could plausibly have been at home on October 24, 2019.

In H.P.H.'s case, he lived in Israel for approximately the first two-and-a-half years of his life. Between May, 2014 and October 24, 2019, however, he spent the vast majority of his life in Slovakia, with the exception of some family trips to Israel and elsewhere. Like his younger brother, he attended school in Slovakia, went to the doctor in Slovakia, participated in extracurricular activities in Slovakia, etc. Given his young age when his family moved to Slovakia, he likely knows no home other than Slovakia. Like his younger brother, H.P.H. was "at home" in Slovakia as of October 24, 2019.

b. Breach of Custody Rights

It is uncontested in the record before the court that Jeremy's removal of the children from Slovakia without Viera's permission violated her custody rights under the laws of Slovakia. Indeed, the 2017 decision of the District Court of Bratislava V specifically forbade Jeremy from

removing the children from Slovakia without Viera's permission. (Respondent Ex. 101 at p. 1) ("[T]he minor children's father shall not be permitted to remove the minor children from the territory of the Slovak Republic without the consent and presence of the children's mother.").

c. Exercising Custody Rights

On the day of the removal on October 24, 2019, Jeremy was exercising his supervised parenting time under the supervision of Viera's father because Viera had to work that day. (Tr. at p. 72.) In 2019, Viera was the children's primary caregiver; the children lived with her, she arranged for their schooling and extracurricular activities, etc. (Tr. at pp. 59–67.) Viera was exercising her custody rights at the time of the removal.

Viera has established all three prongs of wrongful removal under the Convention. The burden now shifts to Jeremy to establish by clear and convincing evidence one or both of the invoked exceptions.

II. Article 13(b) Defense

Article 13(b) of the Convention provides that "when a respondent demonstrates by clear and convincing evidence that there is a grave risk that the child[ren]'s return would expose the child[ren] to physical or psychological harm or otherwise place the child[ren] in an intolerable situation, the automatic return provided by the Convention should not go forward." *Norinder v. Fuentes*, 657 F.3d 526, 534 (7th Cir. 2011). The risk must be truly grave to justify declining to send children back to their place of habitual residence, and although the safety of children is the paramount consideration, courts must interpret the "grave risk" defense narrowly out of concern for comity among nations. *Id.* at 535. The State Department has also stressed that Article 13(b) "was not intended to be used . . . as a vehicle to litigate (or relitigate) the child[ren]'s best

interests." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10494 (1986).

The Court appointed an independent psychologist under FRE 706, Dr. Sol Rappaport, to make an expert assessment of the risks to which the children would be exposed were they to be returned to Slovakia. Rappaport found that Svarinksy likely does not have an interest in pedophilia and that he does not believe the children are at risk of being sexually molested by Svarinsky. (Petitioner Ex. 1 at pp. 29–30.) In his professional opinion, sending the children back to Slovakia would not create an "intolerable situation" for them. (*Id.* at p. 27.) This would have been helpful expert opinion had it been given entirely independent of either side's input. Unfortunately, there is some reason to suspect that his analysis was not as independent as the Court had ordered. Jeremy's counsel's cross-examination of Dr. Rappaport revealed that Dr. Rappaport and Viera's counsel, Ms. Feinberg, have known each other for quite some time. (Tr. at pp. 585–86.) Indeed, Dr. Rappaport attended dinner at Ms. Feinberg's home on one occasion. (Tr. at p. 586:10–11.) Dr. Rappaport spoke with Ms. Feinberg about his testimony before he testified (Tr. at p. 576.) and Ms. Feinberg whispered in Dr. Rappaport's ear about questioning during a recess in the proceedings in this Court. (Tr. at p. 575.) Ms. Feinberg and Dr. Rappaport should have disclosed their preexisting relationship to counsel and the Court. Their failure to do so and the *ex parte* communications in which they engaged during this litigation is troubling to the Court and makes Rappaport's opinions less reliable. Therefore, the Court gives little weight to Dr. Rappaport's report or testimony in reaching a decision in this case and only relies on his conclusion the way in which a common sense juror could make a similar conclusion based upon the facts before her.

In support of Jeremy's contentions that Svarinsky presents a grave risk of harm to the children, Jeremy called Dr. Peter Favaro, who testified as an expert in forensic psychology in

rebuttal to the testimony of Dr. Sol Rappaport. Favaro's principal conclusion was that Rappaport too conclusively ruled out that the children were exposed to sexually inappropriate or grooming behavior. (Respondent Ex. 169.) In Favaro's words, Rappaport "couldn't 100 percent rule [sexual abuse and sexual grooming] out because he didn't have access to all the experience that the children might have had. So I think the statement that he ruled out sexual abuse or sexual grooming was overstated." (Tr. at p. 526.)

Jeremy has not proven that the children would face a grave risk of harm were they to return to Slovakia and interact with Michal Svarinsky. Jeremy's proposed evidence of Svarinksy's pedophilic tendencies and grooming behaviors are unpersuasive. The Court understands the WhatsApp thread regarding masturbation in the presence of Svarinsky's son to suggest, contrary to Jeremy's interpretation, that the presence of his son *detracted* from his sexual arousal, rather than increased it, and that he chose to masturbate in the bathroom rather than doing so in front of his son. And while the Court has serious doubts about the efficaciousness of penile plethysmographs (*see* Tr. at p. 532, wherein Doctor Favaro explains that it is not a reliable method for ruling out sexually inappropriate behavior), the fact that Svarinsky was willing to subject himself to such an invasive test suggests, at a bare minimum, that he cares about the children and would go through that process to show that he should be able to be with them. Moreover, the WhatsApp message referring to H.P.H. and T.S.H. as "sweet-smelling boys" does not strike the Court as particularly troubling, even less so when one considers that the message was translated from the original Slovak and could be lost in translation to a certain extent. In short, the Court does not find that Michal Svarinsky poses a grave risk of harm to the children. Dr. Favaro's testimony makes clear that one cannot—in this case or any case—rule out the possibility of sexual abuse and sexual grooming with one hundred percent certainty. But not being able to rule out sexual abuse

is a far cry from establishing a grave risk that sexual abuse or grooming is present. Jeremy bears the burden of establishing that the children would face a grave risk of being subject to sexual abuse or grooming behavior were they to return to Slovakia. He has failed to establish by the clear and convincing evidence standard required by the ICARA that the children would be exposed to a grave risk of harm were they to return to Slovakia.

Jeremy also argues that it would be an "intolerable situation" for the children to return to Slovakia because their father would not be able to see them. This is because were he to return to Slovakia, he might be arrested due to the criminal stalking charges that are pending against him. (*See* Petitioner Ex. 17.) That the Slovakian authorities might arrest him on "reasonable suspicion" that he committed a crime (*Id.* at p. 9) cannot plausibly be the basis for an Article 13(b) defense. If that were grounds for an Article 13(b) defense, a respondent in a Convention case could manufacture the defense by committing a crime in the country from which he removed the children. Further, during the proceedings before the Court, Viera Hulsh stated that she would be willing to suggest dropping the charges against him were she to return to Slovakia with custody of the children enabling him to see them.

Jeremy has not made out an Article 13(b) defense.

III. Article 20 Defense

Article 20 of the Convention provides that "[t]he return of the child[ren] . . . 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." Convention, art. 20. This exception is meant to apply in a rare circumstance in which returning a child to his country of habitual residence "would utterly shock the conscience of the court or offend all notions of due process." Dep't of State Legal Analysis, 51 Fed.Reg. at 10510 (1986). Nor is the exception a mechanism for courts

to pass "judgment on the political system from which the child was removed." *Id.* Like all the other Convention exceptions, this exception is narrow. *See* 42 U.S.C. § 11601(a)(4); *see also Guerrero v. Oliveros*, 119 F. Supp. 3d 894 (N.D. Ill. 2015) (quoting *Hazbun Escaf v. Rodriguez*, 200 F. Supp. 2d 603, 614 (E.D. Va. 2002)) (explaining that the Article 20 exception must be "restrictively interpreted and applied"). The Respondent bears the burden of establishing this exception by clear and convincing evidence. 22 U.S.C. § 9003(e)(2)(A). The parties to this litigation have not identified a single case in which a respondent has successfully met that burden in an American court. *C.f. Uzoh v. Uzoh*, No. 11 C 9124, 2012 WL 1565345, at *7 (N.D. Ill. May 2, 2012) (explaining that the Article 20 exception "has never been asserted successfully in a published opinion in the United States"); *see also Guerrero*, 119 F. Supp. 3d at 916 (denying an Article 20 defense and returning children to Mexico despite high rates of domestic violence in that country and noting that "Respondents have not provided, and the Court was unable to find, a single case where the court refused to return a child based on Article 20").

Jeremy raises seven concerns related to the Slovakian judicial system that he believes violate two fundamental principles of the United States—namely, the right to due process and the right to parent. Indeed, the right to due process of law is enshrined in our Fifth and Fourteenth Amendments, and the Supreme Court has held that the "interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests" protected by our Constitution. *Troxel v. Granville*, 530 U.S. 57, 64 (2000). Thus, if Jeremy could show by clear and convincing evidence that returning the children to Slovakia would violate Constitutional due process standards or the fundamental right to parent, the Court would not return the children to Slovakia. As outlined below, Jeremy has not met that burden.

a. Right to Notice and Opportunity to Be Heard in Child Custody Proceedings

Dr. Anna Niku, Viera's Slovakian lawyer, testified that, in her experience, Slovakian courts enter temporary custody orders that can last up to three years without giving an opposing parent notice of the proceedings or an opportunity to be heard at the proceedings. (Tr. at pp. 211:15–17, 212:4–8.) In fact, the District Court of Bratislava V granted temporary custody of the children to Viera and ordered payments of child support following an *ex parte* request about which Jeremy received no notice. (*See* Respondent Ex. 101.)

In the United States, the Uniform Child Custody and Jurisdiction and Enforcement Act ("UCCJEA"), which has been adopted in forty-nine states,[8] requires that parents have notice and the opportunity to be heard before custody orders are entered, including temporary ones. *See, e.g.* 750 ILCS 36/205(a) ("Before a child-custody determination is made under this Act, notice and an opportunity to be heard . . . must be given to . . . any parent whose parental rights have not been previously terminated . . . ."); 750 ILCS 36/102(3) ("'Child-custody determination' means a judgment, decree or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order."). Given this framework, the temporary child custody order that the Slovakian district court entered would likely be unlawful had it been entered by a state court in the United States. That being said, the Slovakian court's decision was premised on the notion that Jeremy was likely to try to remove the children from Slovakia, thereby violating Viera's rights to the custody of her children. (*See* Respondent Ex. 101 at ¶ 9) ("The mother is feared [sic] that [the father] might unlawfully remove the children from Slovakia to Israel or any other state since the children also

[8] Massachusetts, the lone hold-out, has the same requirement. *See* Mass. Gen. Laws. ch. 209B, § 5.

have US passports which are now in his possession. Such unlawful conduct would mean that she would be separated from the children for a long time, which would cause an inevitable mental harm to the children at their tender age . . . .”). In other words, the Slovakian court issued a temporary order meant to protect Viera’s parenting rights from what the court viewed, based on the evidence before it, as an imminent threat to those rights. The court also made clear that the decision it made was: 1) “an immediate provisional measure” that 2) “does not constitute a final decision,” 3) that it did not “grant definitive rights” to Viera, and 4) that definitive rights “shall be finally determined only in the main proceedings.” (*Id.* at ¶ 31.)

The procedure used to adjudicate temporary custody rights in the Slovakian judicial system is not contemplated by our UCCJEA, but that does not mean that returning the children to Slovakia would violate Jeremy’s fundamental right to be a parent. Instead, this Court reads the Slovakian decision to suggest that Slovakian courts emphasize upholding parental rights, but that the procedures by which they do so differ from the procedures employed in our courts. Even if Slovakian law does not provide the same procedures for entering temporary orders, the district court’s decision makes clear that it is only temporary in nature and further adjudication would be necessary for the entry of a final order. This Court does not see clear and convincing evidence that sending the children back to a country that respects parental rights but does not follow the UCCJEA’s procedural protections vis-à-vis temporary custody orders would violate a fundamental freedom of the United States.

b. Separation of Powers

Jeremy explains that under the Slovakian judicial system, an official known as the “Public Prosecutor” can intervene in court proceedings and set aside final judgments. He also contends, citing case law from the European Court of Human Rights finding issues with the Slovakian courts,

that there is undue political interference in the judiciary. *See, e.g., Bosits v. Slovakia* (no. 750941/17, May 2020) (awarding money damages of €3,900 for emotional distress to a citizen whose private property was taken for the government by the Prosecutor General of Slovakia contrary to a court order). He suggests that interference of a political branch of government into the workings of the judicial branch is anathema to the American system of separation of powers.

It is true that separation of powers and an independent judiciary are important principles of the American system, but they are not in and of themselves fundamental freedoms; rather, they are design features of our government that are thought to better protect citizens' fundamental rights enshrined in our Constitution. That Slovakia might not have a similar system insulating different branches of government from one another does not mean that Slovakia fails to protect freedoms deemed fundamental in the United States. Even assuming that there is a high level of political interference into the Slovakian judiciary, it does not follow that sending the children back to Slovakia would therefore violate anyone's due process rights or Jeremy's parental rights. Jeremy essentially invites this Court, contrary to State Department guidance on the Convention, to pass judgment on the political system of Slovakia; the Court must decline that invitation.

c. Testimony of Janos Fiala-Butora

Jeremy called Dr. Janos Fiala-Butora, a lecturer in law at the National University of Ireland Galway, who presented testimony regarding human rights law and fundamental freedoms, the European Court of Human Rights, the Council of Europe and the Venice Commission, and the application of human rights law in Slovakia. (Dkt. 165 at p. 286.) Jeremy proffered Dr. Fiala-Butora as an expert in each of those fields; Viera objected that Fiala-Butora was not qualified to give expert testimony under FRE 702 with respect to questions of Slovakia-specific law. (Tr. at p. 286.) He is, however, admitted to the practice of law in Slovakia. (Tr. at p. 281:17–18.)

He graduated from law school in Slovakia. (Tr. at p. 281:19–20.) He has litigated cases before the European Court of Human Rights relating to Slovakia. (Tr. at p. 283:18–20.) He has written several published articles pertaining to Slovakian law, with an international comparative focus. (*See* Respondent Ex. 133 at pp. 2–3.) The Court concludes that he is qualified to opine about the Slovakian legal system based on his academic background, the facts and data on which he relied, and because he applied those facts and data in a reliable way to reach his opinions in this case.

Fiala-Butora's opinion testimony consisted of five basic contentions: 1) there exists a systemic problem within the Slovakian legal system as a whole—namely that lawyers and judges collude with one another, thereby undermining public confidence in the justice system; 2) in some of the cases involving the Hulsh family in the Slovakian legal system, a biased judge presided; 3) the Constitutional Court of Slovakia does not fulfill its primary function of upholding human rights; 4) Slovakian courts fail to enforce custody orders; and 5) Slovakian courts fail to adequately protect individuals' speedy trial rights. (Resp. Ex. 163.) The Court addresses each of these contentions and their application to Article 20 in turn.

i. Issue of Systemic Collusion in General

Fiala-Butora explains, based on his review of case law from the European Court of Human Rights and analysis by the United States Department of State, that there are problems of political influence in the judiciary that undermine public trust in the system. (*Id.* at p. 6.) But Jeremy fails to draw a connection between lack of public faith in the judicial system and any fundamental freedoms that prohibit the Court from returning the children to Slovakia. Although the United States prides itself on the independence of the federal judiciary, it would not "utterly shock the conscience" to return the children to a country whose judges may be more influenced by political considerations than members of the federal judiciary in the United States.

ii. Judicial Impartiality in Hulsh Cases

Anna Niku, Viera's lawyer in Slovakia, represented Judge Patricia Zeleznikova in the judge's divorce proceedings in 2009. (Tr. at p. 196.) Although Niku testified that she did not represent Zeleznikova at any time after 2009, (Tr at p. 195), Jeremy's expert, Dr. Fiala-Butora, discovered after the close of evidence in this case that Niku appears to have again represented Zeleznikova between 2013 and 2015. (Dkt. 170-1 at ¶ 27.)[9] Niku then represented Viera beginning in 2017. (Tr. at p. 196.) Zeleznikova is an appellate judge who sat on four appellate panels on various Hulsh matters, none of which related to the underlying Convention case. (Respondent Ex. 163 at p. 6; Tr. at p. 304.) Jeremy argues that Zeleznikova should not have been on any panel in a Hulsh matter given the possible conflict of interest caused by Niku's previous representation of her. The Supreme Court of Slovakia has ruled, however, in a written decision, that Zeleznikova is capable of impartiality even in cases where Niku serves as counsel. (Respondent Ex. 156.) Zeleznikova is therefore permitted to preside over cases in which Niku serves as counsel. (*Id.* at p. 7) (the opinion of the Slovakian Supreme Court explaining that "the single fact that the judge personally knows the attorney, because she represented her in the past in a personal legal matter, cannot without some additional reasons, constitute the sole reasons for her exclusion from hearing and deciding the given matter").

Jeremy points to the fact that Zeleznikova was able to preside over Hulsh matters despite her previous relationship with Niku as evidence that sending the children back to Slovakia would violate Jeremy's fundamental right to be a parent. But the fact that the American judiciary might

[9] Fiala-Butora discovered this by happenstance by cross-referencing a series of redacted cases from the Constitutional Court of Slovakia. The Court accepts his affidavit (Dkt. 170-1) and case law exhibits as supplemental evidence. The Motion to Reopen for Additional Evidence (Dkt. 170) is granted. The Court assumes on the basis of this newly presented evidence that Niku indeed represented Zeleznikova as late as 2015. It is also clear, however, from a 2015 Slovakian Supreme Court decision that was already in evidence that Niku represented Zeleznikova as late as 2015. (Respondent Ex. 156 at p. 2) ("Dr. Niku was (and most likely still is today) the legal representative of the presiding judge.").

have more robust recusal requirements than Slovakia appears to have does not mean that the judicial system would be biased against Jeremy were the children to return to Slovakia. The possibility that Zeleznikova might serve on a future appellate panel adjudicating another Hulsh matter is speculative and does not "utterly shock the conscience," so it is not a basis for an Article 20 defense. This is especially true given that the Slovakian Supreme Court has considered the issue of Zeleznikova's impartiality and found no evidence of bias. (Respondent Ex. 156; Tr. at p. 197.) That an American court might not have ruled the same way is insufficient to entitle Jeremy to the extraordinary relief provided for by Article 20. Jeremy's argument strikes the Court as another invitation to pass judgment on Slovakia's system of government, which this Court must not and will not do.

iii. Issues with the Slovakian Constitutional Court

Fiala-Butora explains that the Constitutional Court of Slovakia has been criticized by the European Court of Human Rights for failing to ensure that litigants receive fair trials. (Respondent Ex. 163 at p. 6.) Fiala-Butora also opines that the Constitutional Court has not had a full complement of judges and as such has published low-quality decisions. (*Id.* at pp. 6–7.) But the fact that the European Court of Human Rights can provide (and has provided) litigants with relief from potentially misguided decisions of the understaffed Slovakian Constitutional Court assures this Court that the Hulshes fundamental rights and freedoms will not be trammeled in Slovakia.

iv. Enforcement of Custody Orders

Fiala-Butora's report explains that Slovakian police fail to enforce many child custody orders or that when they attempt to enforce them, they are only able to impose nominal fines. (*Id.* at p. 7; Tr. at p. 297.) Fiala cites two cases in which the European Court of Human Rights

found that Slovakia violated the right to family life protected by Article 8 of the European Convention on Human Rights by failing to enforce custody orders. In both cases, the European Court of Human Rights stepped in and provided parents with relief. *See Frisancho Perea v. Slovakia* (no. 383/21, July 2015); *Mansour v. Slovakia* (no. 60399/15, November 2017). While it is troubling that custody orders are not always enforced, Fiala-Butora has not provided the Court with any comparative context for the Court to assess whether the United States or any other country achieves a greater rate of custody enforcement than Slovakia. It is nonetheless reassuring to see that the European Court of Human Rights has stepped in where necessary to provide safeguards so as to uphold parents' fundamental right to the custody of their children.

v. Length of Proceedings

Fiala-Butora explained that judicial proceedings often take a long time to reach resolution in Slovakia. (Respondent Ex. 163 at pp. 7–9.) This issue of slow proceedings sometimes affects child custody cases. (*Id.* at p. 8.) Fiala-Butora explained that 14.38% of child custody cases in Slovakia in 2016 lasted more than a year. (*Id.*) That figure is of limited value to the Court because the Court has nothing to which to compare it, not even the comparable figure in the United States. (*See* Dkt. 76 at p. 309, wherein Fiala-Butora explains that he does not know the comparable figure in Cook County, the United States at large, or any other European country.) Fiala-Butora again points to European Court of Human Rights cases finding that Slovakian courts did not protect speedy trial rights. In each case, the Court then provided relief from what it viewed as unduly lengthy proceedings in the Slovakian courts. *See, e.g.*, *Hoholm v. Slovakia* (no. 35632/13, January 2015) (finding that Convention proceedings took too long in this case); *Lubina v. Slovakia* (no. 50232/99, May 2005) (finding that proceedings in Slovakian courts took too long and ordering Slovakia to pay money damages to the applicant). Once again, this evidence cuts both ways for

Jeremy's Article 20 case. On the one hand, the Slovakian courts have had issues with delays. On the other hand, Slovakia has willingly subjected itself to the jurisdiction of a supranational court that intervenes to provide relief where domestic courts have failed to protect fundamental rights.

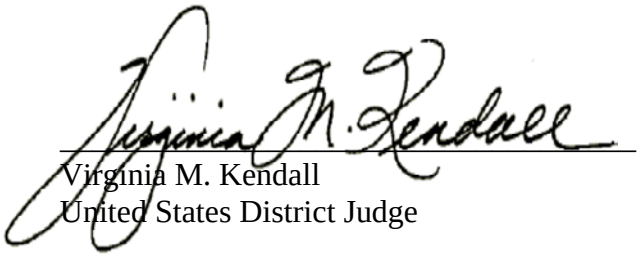
Fiala-Butora's opinions do not persuade this Court that returning the children to Slovakia would violate fundamental principles of the United States relating to the protection of human rights and fundamental freedoms. Jeremy has not met his burden to establish the Article 20 defense by clear and convincing evidence.

CONCLUSION

The Petition for Return of Minor Children (Dkt. 1) is granted. The Court hereby orders that H.P.H and T.S.H. be returned to Slovakia, at Respondent's expense, within twenty-one days from the entry of this Opinion.[10] If the public health crisis prohibits the return within that timeframe, the parties shall immediately inform the Court and the guardians ad litem and make arrangements for the speediest possible return.

[10] The parties engaged in a significant amount of motion practice in this case. This Opinion disposes of pending motions as follows. Petitioner's Motion to Expedite Discovery (Dkt. 47) is dismissed as moot. Petitioner's Motion to Stay Discovery on the Issue of Habitual Residence (Dkt. 78) is dismissed as moot. Petitioner's Motion for Summary Judgment (Dkt. 92) is dismissed as moot. Petitioner's Motion *in Limine* (Dkt. 96) is dismissed as moot because the Court resolved all issues pertaining to the relevance of proposed evidence at the evidentiary hearing. Petitioner's Motion for Leave to File a Reply (Dkt. 109) is dismissed as moot. Respondent's Motion *in Limine* (Dkt. 151) is dismissed as moot because the Court did not consider any of the contested exhibits in this ruling nor were any of the exhibits at issue offered as evidence at the evidentiary hearing. Petitioner's Motion for Rule to Show Cause (Dkt. 154) is denied for lack of evidence regarding parental communications pertaining to this case. Petitioner's Motion *In Limine* to Bar Further Testimony (Dkt. 156) is dismissed as moot.

The Court also grants the Motion to Require Respondent to Pay for Supervisor's Fees and Costs. (Dkt. 63.) The Court will entertain a motion from Petitioner pursuant to 22 U.S.C. § 9007(c) for fees and costs. Any such motion shall be filed, along with an accounting of fees and costs, within 21 days from the entry of this Opinion.



Virginia M. Kendall
United States District Judge

Date: July 21, 2020

Appendix B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VIERA HULSH, formerly known as VIERA WISTEROVA,	)	
Petitioner,	)	No. 19 C 7298
	)	(CA7 case no. 20-2324)
v.	)	
	)	Judge Virginia M. Kendall
JEREMY HULSH,	)	
Respondent.	)	

ORDER

On July 21, 2020, this Court granted Viera Hulsh's Petition for the Return of Minor Children pursuant to the Hague Convention. (Dkt. 177.) Consistent with the mandate that courts order the "prompt return of children wrongfully removed or retained," *Chafin v. Chafin*, 133 S. Ct. 1017, 1026 (2013), the Court ordered the children returned to Slovakia within twenty-one days of the entry of the Opinion, or August 11. Within hours of this Court's decision, Jeremy Hulsh filed notice of appeal (Dkt. 179) and filed a motion with the Seventh Circuit requesting a temporary stay of the children's return. (CA7 case no. 20-2324, dkt. 2-1.) On July 22, 2020, the Seventh Circuit denied Jeremy's motion without prejudice and forwarded it to this Court for consideration in the first instance pursuant to Federal Rule of Appellate Procedure 8(a)(1)(A).

Courts do not stay return orders pending appeal as a matter of routine. *Chafin*, 133 S. Ct. at 1027. Instead, courts consider four factors to determine whether a stay is appropriate in a given case: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* Here, three of the factors favor denying the motion to stay.

i. Likelihood of Success on the Merits

Jeremy's likelihood of success on the merits is low. At the evidentiary hearing before this Court, Viera clearly established a *prima facie* case of wrongful removal, and Jeremy failed to establish by the clear and convincing evidence standard either of his invoked exceptions. Indeed, the Article 20 exception that Jeremy's motion relies on most heavily has never been successfully invoked in a federal court. The evidence presented regarding the Slovakian judiciary fails to establish that sending the children back to Slovakia would violate any fundamental principle of the United States relating to the protection of human rights and fundamental freedoms. Likewise, he has a low likelihood of succeeding with his Article 13(b) defense on appeal because the evidence presented to the Court regarding grave risk was unconvincing and he bore the burden of establishing the defense by clear and convincing evidence.

Jeremy presents two arguments in his appeal that suggest he misunderstood the Court's views of the merits of this case. First, this Court is well aware of the role of the European Court of Human Rights ("ECHR") vis-à-vis domestic European courts. When the Court referred to the ECHR as having "affirmed" a decision of the Slovakian domestic courts (Dkt. 177 at p. 10), the Court did not use the word "affirm" in a hierarchical sense the way an appellate court would "affirm" the decision of a lower court, but rather simply to indicate that the ECHR found no violation of rights in the Slovakian domestic court's judgment. The Court understands that the ECHR lacks authority to overrule a domestic court. Second, the Court did not exclude the testimony of Dr. Sol Rappaport, but rather gave it little weight because of his potential lack of independence. Expert testimony was not, in any event, particularly useful in this context because the evidence before the Court consisted largely of WhatsApp messages that the Court interpreted using common sense. The Court found on the basis of its own interpretation of those messages that they do not suggest that Svarinsky posed a grave risk to the children; they certainly do not establish grave risk by clear and convincing evidence.

ii. Irreparable Injury

Jeremy would not be irreparably injured absent a stay. As the Supreme Court explained in *Chafin*, even if the Seventh Circuit were to reverse this Court after Viera had already transported the children to Slovakia, U.S. courts would retain personal jurisdiction over her and "may command her to take action even outside the United States, and may back up any such command with sanctions." 133 S. Ct. at 1025. In other words, even if Viera brought the children back to Slovakia today, Jeremy's appeal would not be moot and he would still be able to seek relief from the Seventh Circuit.

iii. Injury to Other Parties

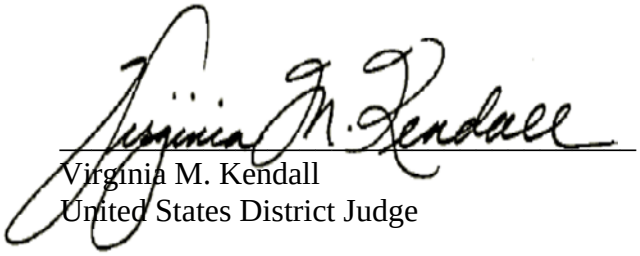
It is not clear that denying the stay would cause Viera to suffer any substantial injury.

iv. Public Interest

The public interest favors returning the children to their country of habitual residence as expeditiously as possible. *See id. at* 1027 ("[C]ourts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation."). With the school year beginning in short order, delaying the children's return any further will only make the transition more difficult for them. (*See* Dkt. 180 at p. 2, wherein Viera reports that the children's school year in Slovakia begins on September 1). They have already been deprived of approximately seven months of schooling in their country of habitual residence. Delaying their return by granting a stay might cause them to start school late, which would only cause further hardship.

CONCLUSION

The emergency motion for a temporary stay is denied. The Clerk of Court is directed to forward this Order to the Court of Appeals forthwith.



Virginia M. Kendall
United States District Judge

Date: July 23, 2020

Appendix C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 24, 2020

Before

DANIEL A. MANION, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 20-2324

VIERA HULSH,
Petitioner-Appellee,

v.

JEREMY HULSH,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:19-cv-07298

Virginia M. Kendall,
Judge.

O R D E R

In late 2019, appellant Jeremy Hulsh ("father") abducted his children from their home in Slovakia, the family's home country, and in violation of the orders of the Slovakian court presiding over Hulsh's divorce and child custody, support, and visitation issues. He brought his children to the United States. His ex-wife, appellee Viera Hulsh ("mother"), quickly filed this suit under the Hague Convention on the Civil Aspects of International Child Abduction and 22 U.S.C. § 9001 et seq., for an order to return the children to Slovakia. After evidentiary hearings delayed by court closures during the COVID-19 pandemic, the district court issued detailed findings of fact and conclusions of law and ordered the children's prompt return to Slovakia, presumably in time to start the new school year there.

The father appeals that order and has moved for an emergency order staying the return order pending appeal, or at least for twenty-one days for further briefing. The district court denied a stay pending appeal. A stay of an injunction pending appeal is not a matter of routine, but calls for individualized consideration, including in cases under the Hague Convention. See *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Chafin v. Chafin*, 568 U.S. 165, 179—80 (2013). *Nken* and *Chafin* teach that we must consider whether the father has made a strong showing of likely success on the merits and a threat of irreparable harm, as well as the risk of harm to other parties and the public interest.

The father has not shown any significant likelihood of prevailing on the merits of his appeal. There is no doubt that his furtive abduction of his children from their home and home country violated the Convention. Unless he can establish one of the narrow defenses recognized by the Convention, the proper remedy is exactly what the district court ordered: prompt return of the children to their home country ("habitual residence," in Convention terms), where the courts may deal with the family's issues.

In implementing the Convention, Congress found that children who have been wrongfully removed or retained "are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies." 22 U.S.C. § 9001(a)(4). Congress declared: "The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." 22 U.S.C. § 9001(b)(4). The State Department advised Congress that the Convention's exceptions were "drawn very narrowly lest their application undermine the express purposes of the Convention—to effect the prompt return of abducted children," and that Convention delegates believed that "courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly meritorious cases, and only when the person opposing return had met the burden of proof." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494, 10,509 (March 26, 1986). The father here relies on two defenses or exceptions to justify his abduction and defeat return.

The first is the Article 13b exception where the abductor shows by "clear and convincing evidence that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. . . ." The father offered meager evidence to the district court suggesting that the mother's partner might be grooming the children for sexual abuse. The district court considered that evidence carefully and explained her thinking clearly. The judge found

the evidence was "unpersuasive" and certainly fell far short of the clear and convincing evidence required. That finding of fact would be extremely difficult to upset on appeal.

The second exception is the Article 20 exception where a return would violate fundamental principles of the United States relating to the protection of human rights and fundamental freedoms. As the district court pointed out, the U.S. Department of State has explained that this exception is meant to apply in rare circumstances where returning a child to his home country "would utterly shock the conscience of the court or offend all notions of due process." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10510 (1986). Article 20 is not intended to deny return to any country that does not match the ideals the United States sets for its own judicial system. The district court carefully parsed the father's criticisms of the Slovakian judicial system and government and its handling of his own family's case, and persuasively rejected them. The father has not shown any reasonable prospect of prevailing on the merits of his appeal.

We also consider the risks of irreparable harm to the children and the father and mother if return is erroneously ordered or erroneously delayed. Return of the children to Slovakia will not render the appeal moot. *Chafin v. Chafin*, 568 U.S. 165, 174—75 (2013). The combination of the father's abduction of the children and delays from the pandemic have extended their stay in the United States to nine months, disrupting the children's education and activities and social relationships in Slovakia. There is a risk of irreparable harm based on an error in either direction. In this situation, the Convention's strong slant toward prompt return, *Chafin*, 568 U.S. at 179—80, and the father's very weak showing on the merits weigh heavily toward prompt return to Slovakia. We have no reason to doubt the Slovakian courts' power and capacity to deal with the legal issues posed by the disputes between the father and the mother.

Accordingly, the father's emergency motion for a stay of the return order is hereby denied.