No. 20-1034

In the
Supreme Court of the United States

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

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

BRIEF FOR *AMICUS CURIAE* CHILD ABDUCTION LAWYERS ASSOCIATION (CALA) IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Child Abduction Lawyers Association ("CALA"), based in the United Kingdom, is an association of experienced child abduction lawyers. CALA's membership includes solicitors, barristers, academics, and other practitioners who practice or maintain an interest in international child abduction law. CALA's members are primarily based in England and Wales. CALA membership includes the panel members of the International Child Abduction and Contact Unit, which is maintained by the Lord Chancellor's Unit in London.[2] CALA aims to connect its members with practitioners throughout the world, including the United States of America.

On July 1, 1988, the United Kingdom and the United States of America ratified The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980 (the "Hague

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[1] Pursuant to Sup. Ct. R. 37.6, *Amicus Curiae* certify that this Brief was not authored, in whole or in part, by any counsel for a party, and that no person other than *Amicus*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this Brief. All parties have consented to the filing of this Brief.

[2] This Brief does not necessarily reflect the views of any particular member of the Child Abduction and Contact Unit or the Lord Chancellor's Unit in London. No inference should be drawn that any member of these Units who is also a member of CALA participated in the preparation or submission of this Brief.

Convention" or "Convention").[3] In the handful of cases that have been heard before the Supreme Court of the United States addressing the application of the Hague Convention, this Court has had the benefit of the United Kingdom's perspective and application of the treaty's principles.

On an annual basis, numerous Hague Convention cases arise between the United States of America and the United Kingdom.[4] *Amicus Curiae* therefore have an interest in promoting internationally the uniform interpretation and application of the Hague Convention. CALA believes that uniformity of approach in this international realm fosters mutual trust and promotes cooperation between Member States of the Convention. One specific mission of CALA is improving the connection and communication between child abduction lawyers in England and Wales and

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[3] Convention on the Civil Aspects of International Child Abduction (Oct. 25, 1980), T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10,493 (1986), text available at: https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction. The 1980 Hague Convention applies between the United States and the United Kingdom. The United Kingdom has also ratified the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Child, done at the Hague (October 19, 1996) (the "1996 Convention"). The United States has not ratified the 1996 Convention.

[4] *See, e.g.*, U.S. Dep't of State, *Annual Report on International Child Abduction (2021)*, at p. 212, https://travel.state.gov/content/dam/NEWIPCAAssets/2021%20Annual%20Report%20on%20International%20Child%20Abduction.pdf.

similarly experienced international child abduction lawyers throughout the world.

The single question presented in this case is focused on Article *13b* of the Convention, which states: "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 . . . 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 question before this Court, as posed, states: "[w]hether, upon determining that return to the country of habitual residence places a child at grave risk, a district court is required to consider ameliorative measures that would facilitate the return of the child despite the grave-risk determination." (Pet. Brief, p. I).

Amicus submits this Brief to offer information and assistance to this Court by addressing the English approach to interpreting the ameliorative measures contemplated by Article 13*b* of the Convention. The overarching aim of the Convention is the protection of ". . . children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."[5] *Amicus* respectfully submit that the approach established by the English courts, as explained below, upholds the aims of the Convention by ensuring that courts do not exceed the

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[5] Hague Convention, *preamble*.

scope of the narrow exceptions inherent in this treaty, while also reducing the possibility of overreaching into the underlying merits of the child custody dispute. The English approach to ameliorative measures eliminates the risk of undue delay by a) expeditiously deciding matters, and b) upholding the aim of the Convention to ensure the underlying custody dispute is decided by a court of competent jurisdiction in the country of habitual residence.

Amicus therefore submits this Brief in support of Respondent's position on the question presented only insofar as it concerns an issue of law and application of principle for this international treaty. CALA remains neutral with respect to the factual disputes between Petitioner and Respondent.

SUMMARY OF ARGUMENT

The Convention is an international instrument that necessitates an autonomous interpretation of its terms. Uniform interpretation and application by Member States promotes mutual trust and achieves the Convention's objectives.

The Explanatory Report by Professor Eliza Pérez Vera is a critical resource in the interpretation of this international treaty.[6] English courts often rely on the Explanatory Report as an aid to interpret the treaty when determining cases under the Convention.

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[6] Elisa Pérez Vera, *Explanatory Report: Hague Conference on Private International Law,* 3 Acts and Documents of the 14th Session, at p. 20, §25 (1980) ("Explanatory Report").

As set forth in the Explanatory Report, the two objects of the Convention are 1) prevention of the abduction of children and 2) swift restoration to the child's state of habitual residence in case of an abduction. These objects are shaped by the consensus reached between Member States when drafting the Convention, and thereafter ratifying it, regarding what is in the best interests of children. This consensus resulted in an instrument that protects children's best interests from the prejudices of a wrongful removal or retention by effectuating the prompt, expeditious return to their country of habitual residence. Thus, the central premise of the Convention is to ensure the swift restoration of children to the country of their habitual residence so the courts in the "home" country can make decisions about substantive custody issues. As a result, the Convention promotes both the best interests of the individual child and of children generally as its primary objective.[7]

Courts addressing Hague Convention cases are faced with a binary decision: order the return of the child to the country of habitual residence or decline to order the return of the child to the country of habitual residence. There are a few narrow exceptions to the mandatory duty to order the return of the child. The narrow exceptions are expressly set forth in the text of the Convention. The Explanatory Report states that the exceptions must be applied restrictively— "only so

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

far as they go and no further."[8] To that end, "[t]his implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter."[9]

Article 13*b* of the Convention sets forth an exception to return known as the "grave risk of harm" exception. The English courts consider that by its wording the Article 13*b* exception is narrow. If established, the grave risk of harm exception can result in the court declining to order the return of a child to her country of habitual residence. Notwithstanding, a court can require the return of a child even when there is a finding of a grave risk of harm. The Permanent Bureau of the Hague Conference on Private International Law ("HCCH") published the *1980 Child Abduction Convention Guide to Good Practice*, Part VI, Article 13(1)(b) on March 9, 2020 ("Guide to Good Practice"). The Guide to Good Practice states that ". . . the wrongful removal or retention of a child is prejudicial to the child's welfare and that, save for the limited exceptions provided for in the Convention, it will be in the best interests of the child to return to the State of habitual residence."[10]

Returning a child under circumstances that meet the threshold finding of grave risk eliminates the court

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[8] *Explanatory Report*, p.22, §34.

[9] *Id.*

[10] Hague Conference on Private Int'l Law, *1980 Child Abduction Convention Guide to Good Practice, Part VI, Article 13(1)(b)* (March 9, 2020), at p. 21 ¶14.

wading into the underlying custody dispute, which promotes one of the central principles of the Convention—the country of habitual residence is best placed to determine the underlying custody dispute. Thus, ". . . as a rule, the courts of the child's State of habitual residence are best placed to determine the merits of a custody dispute (which typically involves a comprehensive 'best interests' assessment) as, *inter alia*, they generally will have fuller and easier access to the information and evidence relevant to the making of such determinations."[11]

Under the English approach, the court's ability to require the return of a child, even in the face of a potential grave risk of harm, relies on the court's ability to use ameliorative measures. The language of Article 13*b*, in fact, contemplates the use of such measures: "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child . . . ."[12] To determine whether a return should be required in the face of a grave risk of harm to the child, the court must consider ameliorative measures (also known as protective measures) as part of that determination. This evaluation should be conducted in a holistic manner by determining the risk alongside the ameliorative measures such that if the ameliorative measures are adequate in the circumstances of the case, then the threshold to

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[11] *Id*. at p. 22, ¶ 15.

[12] Hague Convention, Art. 13.

establish a grave risk of harm under Article 13*b* is not crossed.

In the underlying litigation, the district court ordered the return of the minor child to Italy (his country of habitual residence) pursuant to certain ameliorative measures intended to protect the minor child in the interim, and to allow Italy to move forward with the pending custody litigation. The ameliorative measures ordered by the district court included, *inter alia*, the issuance of a protective order in Italy that required Respondent to stay away from Petitioner and the minor child's residence, Petitioner's place of work, and the minor child's school; financial support provided to Petitioner; and supervised parenting time for Respondent.

In ordering the ameliorative measures, the district court sought to ensure that the parties remained separate from one another by requiring an order of protection in place in Italy. It is apparent that the district court sought the separation of the parties because of the domestic violence that resulted in the finding of grave risk of harm to the minor child.[13] After several appeals to the United States Court of Appeals for the Second Circuit, the district court's orders and ameliorative measures were upheld. The Second Circuit determined that the ameliorative measures

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[13] It is noted that the ameliorative measures were put in place because Petitioner stated that she intended to return to Italy. It is understood that the district court expressly found that there was no grave risk of harm if the minor child were returned to Respondent's care in Italy.

were sufficient to alleviate the finding of grave risk of harm to the minor child upon his return to Italy.

Similar ameliorative measures are used in Hague Convention matters before the English courts. Ameliorative measures are used to protect and promote the child concerned as well as the abducting parent if considered necessary for the protection of the child. The use of ameliorative measures enables the courts to adhere to the underlying principles of the Convention, while at the same time protecting the best interests of the children involved. These ameliorative measures are designed to be, generally, short-lived measures of protection lasting until the courts in the country of habitual residence become engaged in the litigation between the parties upon the child's return.

The approach of the English and Welsh courts seeks to determine if ameliorative measures are sufficient to negate further exposure to a grave risk of harm should the child be returned to her country of habitual residence. If the ameliorative measures are sufficient to negate further risk of harm, the petitioning parent is then required to submit to the measures identified by the court as being necessary to facilitate the child's return. It is understood that this process is like the Second Circuit's approach.

As explained below, the approach promulgated by the United Kingdom Supreme Court and followed in England and Wales in its interpretation and application of Article 13*b* is commended. Not only does it follow the practice advocated by the Conference of the 1980 Hague Convention, it has the benefit of resolving the tension between the requirement to

determine disputed facts while respecting the nature of the expeditious and summary process under the Convention, as well as preventing undue delay in the return of a child to his or her habitual residence by maintaining the prompt resolution of Convention cases.

ARGUMENT

I. Article 13*b*: The English Approach to the Exception to Return.

Article 13 provides three instances where the Convention limits the court's duty to order the return of the child. This Court is concerned with the second limb of Article 13*b* which states:

> ". . . 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 . . . *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." [14]

The Report of the Third Special Commission Meeting to review the operation of the Hague Convention in 1997 concluded that the Article 13*b* exception is crucial to the efficacy of the Convention given that the

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[14] Hague Convention, Art. 13*b*.

exception is a sensitive one which, if misapplied, could nullify the Convention.[15]

Although Article 13*b* reads that it is the child who must face the grave risk of harm if returned, the rationale behind the exception is the "primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation."[16] It is now well recognized that a child can suffer harm by witnessing violence against another. Courts in the United Kingdom have therefore interpreted that "any person" includes the abducting parent as well as the child.[17] The inquiry is focused on the circumstances that *will* exist upon the return of the child, which indicates that the exception is forward-looking. Adopting the cautionary words of the Explanatory Report, it has been highlighted in several cases in England and Wales that if the objectives of the Convention are to be upheld, the Article 13*b* inquiry must be restrictively applied.[18]

The United Kingdom Supreme Court ("UKSC") first considered the Article 13*b* exception in *Re E* (Children) [2011] UKSC 27, [2012] 1 AC 144. The UKSC

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[15] *Report of the Third Special Commission Meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction* (March 17-21, 1997), https://assets.hcch.net/upload/abduc97e.pdf.

[16] *Explanatory Report*, p. 21 §29.

[17] *See, e.g.*, *Re E* (Children) [2011] UKSC 27, [2012] 1 AC 144 (Abduction: Custody Appeal).

[18] *Explanatory* Report, p. 22 §34.

considered that the exception available under Article 13*b* has restricted application by its terms. Therefore, it need not be narrowly construed. Further, as Lowe and Nicholls in the *International Movement of Children, Law, Practice and* Procedure state, a strict approach to the application of Article 13*b* is reflected in the extensive jurisprudence in most other major jurisdictions,[19] including the United States.[20] Importantly, Article 13*b* is forward-looking such that the court must consider whether the allegations of past conduct *will* give rise to a risk of future conduct capable of establishing the exception.

In assessing whether the exception is established, the UKSC holds that the taking parent must produce evidence to substantiate the exception. Although in the context of the expeditious and summary process of Convention proceedings in England and Wales, it is rarely considered appropriate to hear oral evidence on the disputed factual allegations that constitute the grave risk claim because doing so would prolong the summary process contrary to the aims of the Convention. This approach is consistent with Article 11 which requires courts to ". . . act expeditiously in proceedings for the return of children."[21]

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[19] *See, e.g.*, *inter alia*, Republic of Ireland, France, Germany, Australia, New Zealand and Canada.

[20] Lowe and Nicholls, *International Movement of Children, Law, Practice and Procedure* (2nd Ed.) (2016).

[21] Hague Convention, Art. 11.

In *Re E*, the UKSC identified the tension which exists between the inability to determine factual disputes through oral evidence which occurs during the standard trial process and the need to resolve disputed allegations to determine whether the Article 13*b* threshold has been met. To balance the two competing factors, Baroness Hale adopted a "sensible and pragmatic"[22] solution which involves the following questions posed by the court:

> (1) Do the allegations, if true, present a grave risk that the child will be exposed to harm, or an otherwise intolerable situation, upon return? The allegations are taken at their highest or at face value in this exercise.
>
> (2) If the above is answered in the affirmative, how can the child be protected against the grave risk of harm?

Under this approach, the evidence concerning the grave risk of harm exception and the protective measures available to mitigate the grave risk should be analyzed under the above two questions. After consideration by the court, if the protective measures available are not adequate to protect the child upon return, the UKSC has held that the court may have no option but to do "the best it can" to resolve the disputed issues.

This same approach was applied by the UKSC in *Re S* (A Child) [2012] UKSC 10, [2012] 2 AC 257. In that case, Lord Wilson held that the approach in *Re E*

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[22] *See Re E supra*, ¶ 36.

should form part of the court's general process of reasoning in its analysis of a defense under Article 13*b*. The UKSC endorsed the approach adopted by the High Court Judge which established the evaluative process in the following steps:

> (1) The court assumes that the allegations made against the applicant are true, that is, the allegations are taken at their highest.
>
> (2) On the assumption that the allegations are true, whether the protective measures available would obviate the risks alleged.
>
> (3) If the protective measures are not sufficient to obviate the risks, the court proceeds to determine whether the allegations made are indeed true, in the context of the summary nature of the proceedings.

The UKSC approach does not require strict adherence to the usual trial process (*i.e.*, reliance on oral evidence) before the court determines whether the allegations give rise to an Article 13*b* risk. Instead, the court usually decides the matter on the written papers alone.

Central to the assessment of the Article 13*b* risk is the availability and quality of protective measures to mitigate the risks alleged. Under this approach, requiring courts to consider or impose protective measures does not force courts to delve into the merits of the underlying custody dispute. To the contrary, this approach allows the court to side-step the issue altogether while creating a path for the country of habitual residence to undertake the custody dispute.

The English approach does not require courts to engage in lengthy trials involving several days of oral evidence. In fact, in cases involving Article 13*b* it is the norm for the court to assess the written evidence and to hear oral submissions only in determining the application.

This approach is not to suggest that the requirement to take allegations at their highest in summary proceedings means the court is unable to evaluate them for veracity. For instance, in *Re K* [2015], EWCA Civ 720, the Court of Appeal of England and Wales found that the High Court Judge had not erred in solely assessing the written evidence and dismissing the taking parent's allegations which were unsubstantiated by any evidence.

In considering the process involved in assessing an Article 13*b* defense, Lord Justice Moylan in *Re C* (Children) [2018] EWCA Civ 2834, stated the court should conduct an evaluative assessment of the allegations and the evidence but that "of course, a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations."[23] Lord Justice Moylan further clarified that the court must address the nature of the risk (*e.g.*, domestic violence in *Re C*) occurring in the future and answer why this risk is not sufficiently ameliorated by the measures proposed by the petitioning parent.

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[23] *See Re C supra*, ¶ 39.

Thus, the English court is invited to assess the allegations of future harm against the measures proposed with a view of determining whether the risk will be sufficiently ameliorated by the measures proposed. If the court finds that the protective (or ameliorative) measures are sufficient, the threshold of Article 13*b* is not met. The court's mandatory duty to order the return of the child under Article 12 is then invoked.

II. The International Approach.

The Permanent Bureau of the Hague Conference on Private International Law published the 1980 Child Abduction Convention Guide to Good Practice, Part VI, Article 13(1)(b) on March 9, 2020. As stated in the foreword, the document is intended to provide guidance to, *inter alia*, judges who are faced with applying Article 13*b*. The Guide's purpose is to "promote, at the global level, the proper and consistent application" of Article 13*b* in accordance with the terms and purpose of the Convention.[24] Contributors to drafting the Guide include the United States of America through the Honorable Ramona Gonzalez.[25]

The Guide to Good Practice explains the scope of the Article 13*b* analysis. It states that while the examination of the exception will usually necessitate an analysis of past behavior or circumstances alleged by the abducting parent, the analysis "should not be

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[24] *Guide to Good Practice*, p. 15, ¶ 3.

[25] *Id.*, p. 18, fn. 20.

confined to an analysis of the circumstances that existed prior to or at the time" of the child's taking.[26]

The Guide clearly states, to assess the future circumstances, an examination of the Article 13*b* exception should include, "if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence."[27] Relying on international jurisprudence, the Guide further states that past behavior and past incidents are not conclusive that effective protective measures are not available to protect the child from grave risk of harm upon return to the country of habitual residence.[28]

The assessment process set forth in the Guide to Good Practice involves a step-by-step analysis consisting of:

> (1) "Whether the assertions are of such a nature, and of sufficient detail and substance, that they ***could*** constitute a grave risk . . . ."
>
> (2) If step 1 is answered in the affirmative, then "the court determines whether it is satisfied that the grave risk exception to the child's return has been established by examining and evaluating the evidence presented by the person opposing the child's return /

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[26] *Id.*, p. 27, ¶36.

[27] *Id.*

[28] *Id.*, p. 27, ¶ 37.

> information gathered, ***and*** by taking into account the evidence / information pertaining to protective measures available in the State of habitual residence."[29]

Crucially, the Guide explains that the above exercise "means that even where the court determines that there is sufficient evidence or information demonstrating elements of potential harm or of an intolerable situation, *it must nevertheless duly consider the circumstances as a whole, including whether adequate measures of protection are available or might need to be put in place to protect the child . . . .*"[30]

To conclude, the Guide reiterates that if the "court is *not* satisfied that the evidence presented / information gathered, including in respect of protective measures establishes a grave risk, it orders the return of the child."[31] A finding that a grave risk is established leaves the court with the judicial discretion to nonetheless return the child to the habitual residence.[32] However, in England and Wales, the House of Lords opined that if ameliorative measures were not available "*. . . it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological*

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[29] *Id.*, p. 31, ¶¶ 40-41 (emphasis added).

[30] *Id.*, p. 31, ¶ 41 (emphasis added).

[31] *Id.*, p. 32, ¶ 42.

[32] *See* Hague Convention, Art. 18.

harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate."[33]

In some jurisdictions, the determination of Article 13*b* is sequential in nature such that the finding that a grave risk of harm to the child upon return is likely to materialize triggers the Article 13*b* threshold and the imposition of protective measures.[34] In fact, the Guide directs that "[c]ourts commonly assess the availability and efficacy of protective measures at the same time as they examine the assertions of grave risk; alternatively, they do so only after the existence of a grave risk and an understanding of its nature has been established by the party objecting to return."[35] Other jurisdictions, such as Australia, incorporate in their assessment of risk "whether the country of habitual residence has the means to protect the child from potential abuse."[36]

It has been argued that using ameliorative measures, whether by sequential process or otherwise, causes delay. This argument belies the efficacy of the ameliorative measures, which uphold and promote the underlying principles of the Convention. *Amicus*

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[33] *See Re D* [2006] UKHL at ¶ 55 (Baroness Hale) (emphasis added).

[34] *See, e.g.*, Austria: Marie-Therese Rainer, *Article 13 exceptions – return and best interests of the child*, Int'l Family Law Journal 2018, Issue 3, p. 190.

[35] *Guide to Good Practice*, p. 34, ¶ 45.

[36] Linda Manfre, *International Parental Child Abduction in Australia*, Int'l Family Law Journal 2010, p. 152.

submit that the factors that are liable to engender delay are usually the court's ability to offer early hearings, and at times the fact that cases are appealed, which can be a lengthy process. It is not the court's use of ameliorative measures that is likely to cause delay. The timing of such measures or the process in which they are determined (*e.g.*, a sequential two-part process, etc.) is the crux of the matter:

> Ideally, given that any delays could frustrate the objectives of the Convention, potential protective measures should be raised early in proceedings so that each party has an adequate opportunity to adduce relevant evidence in a timely manner in relation to the need for, and enforceability of, such measures. In some jurisdictions, in the interests of expedition, where the court is satisfied in a particular case that adequate and effective measures of protection are available or in place in the State of habitual residence of the child to address the asserted grave risk, the court may order the return of the child without having to enter into a more substantive evaluation of the facts alleged.[37]

The requirement that the parties propose at the outset of proceedings ameliorative measures that are likely necessary in the event an Article 13*b* exception is met is inherent in the English approach. This requirement has the benefit of enabling the court to identify the available measures and triggers any

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[37] *Guide to Good Practice*, p. 34, ¶45.

needed investigations within the timetable set for determination of the case.

The Central Authority for each State party to the Convention and, separately, the Hague Judicial Network provide reliable assistance to courts deciding Hague Convention cases. The latter has worked well in England and Wales through the coordination of the International Family Justice Office chaired by Lord Justice Moylan. These resources enable speedy resolutions of issues that may arise concerning the efficacy and enforceability of ameliorative measures.

As noted above, the Convention requires all abduction cases to be expeditiously determined. In England and Wales these cases are afforded priority. The English courts aim to determine Hague cases within six weeks of being issued. However, understandably, the six-week goal is not always possible and anecdotally cases appear to be determined within twelve to sixteen weeks of being issued. Insofar as the length of hearings are concerned, cases involving multiple issues are rarely listed for more than two to three days. A case centered on Article 13*b* alone is unlikely to occupy more than one day of court time.

In conclusion, the English approach to the interpretation of Article 13*b* and the consensus reached at the Hague Conference demonstrates that proper application of the grave risk exception includes consideration of any ameliorative (protective) measures that are available to mitigate the risks asserted. Further, the practical steps taken to determine the issues that arise in these cases minimize potential for

delay and enables the courts in England and Wales to remain faithful to the principles of the Convention.

III. Ameliorative Measures Under the Hague Convention and Within Europe Under Brussels II Revised.

Council Regulation (EC) No. 2201/2003 of 27 November 2003 (commonly referred to as "Brussels II Revised" or "Brussels IIa") deals with matters of jurisdiction, recognition and enforcement in matrimonial matters and matters related to parental responsibility for children between Member States of the European Union.[38] Between these Member States, the Regulation takes precedence over the Hague Convention. Thus, in matters of child abduction where the Regulation applies, it dictates areas such as jurisdiction and recognition between Member States.

Article 11(4) of the Regulation states that "[a] court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."[39] This provision only applies to Article 13*b* of the Convention. It is apparent from the wording that this Article of the Regulation removes the discretion of the court to decline to order the return of an abducted child to a Member State, which is inherent in the Convention

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[38] Council Regulation (EC) No. 2201/2003 of 27 November 2003, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R2201&from=EN.

[39] *Id.*

if sufficient ameliorative measures are in place to safeguard the child upon a return.

The Practice Guide for the application of the Brussels IIa Regulation (2014) drafted by the European Commission explains that Article 11(4) of the Regulation extends the obligation to return the abducted child even if a grave risk of harm under Article 13*b* of the Convention is established provided that the authorities in the State of habitual residence have made adequate arrangements to secure his or her protection upon return.[40]

It therefore follows that a court cannot refuse to return the child unless it is established that adequate arrangements are unavailable to protect the child. Under the Regulation, the relationship between Member States is based upon the principle of mutual trust, which is similar to the relationship between Member States of the 1980 Hague Convention.

The United Kingdom is no longer a Member State of the European Union. Therefore, the Regulation is no longer engaged in cross-border disputes with European countries unless instituted prior to December 31, 2020. However, the English courts' practice has been consistent in cases involving Article 13*b* whether the Regulation is engaged or not. It is therefore unlikely that this change will have any tangible impact in Hague Convention cases decided by English courts.

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[40] Practice Guide for the application of the Brussels IIa Regulation, https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed.

The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children 19 October 1996 (the "Hague Protection Convention') also enables courts to accept measures of protection between Member States of the Convention. The United States of America is not a Member State to the Hague Protection Convention. These measures are available following a determination under the 1980 Hague Convention or in any emergency cases based on the child's presence in England.

The Hague Protection Convention addressed a gap in the 1980 Hague Convention. Article 11 of the Hague Protection Convention enables the court determining an application under the 1980 Hague Convention to make interim orders for protection which have extra-territorial effect. As a result, these interim orders for protection remain in effect until superseded by orders made in the State of habitual residence.

The Practical Handbook on the Operation of the 1996 Hague Child Protection Convention (2014) produced by the Permanent Bureau explains that the purpose of enabling the requested court to make orders that have effect in the home country is to ". . . ensure the safe return of the child and to ensure the child's continued protection in the requesting Contracting State (until the authorities in that Contracting State can act to protect the child)."[41] Under the Hague

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[41] Hague Conference on Private Int'l Law, *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*

Protection Convention, any contracting State will be able to take measures that are effective and enforceable in England and Wales prior to the return of the child.

IV. Undertakings as Protective Measures.

In English law, undertakings are binding promises made to the court enforceable, if breached, by way of imprisonment, fine or asset seizure. They are often used in domestic civil disputes. Lowe and Nicholls state that the practice of accepting undertakings in Hague Convention cases was first pioneered by the English Courts.[42]

In *Re O* [1994] 2 FLR 349, the late Singer J commented that so far as the English courts were concerned there is no doubt that undertakings could be accepted to mitigate what would otherwise be an intolerable situation. As a result, undertakings in Convention cases are commonly used to mitigate a grave risk that has been identified and to provide a measure of protection to the abducting parent and children upon return through soft-landing provisions.

In *Re Y* [2013] EWCA Civ 129, the English Court of Appeal found that undertakings are a category of protective measures in the context of the 1996 Hague Protection Convention. Lord Justice Thorpe considered

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(2014), https://assets.hcch.net/docs/eca03d40-29c6-4cc4-ae52-edad337b6b86.pdf

[42] *See International Movement of Children, Law, Practice and* Procedure, p. 575 at 24.62.

that at least forty to fifty signatories to the 1980 Convention used undertakings as protective measures.

It was recognized by the English courts that these undertakings, while enforceable in England and Wales as set out above, are often not recognized in other jurisdictions. They were, nonetheless, used to provide short-term relief before the courts of the requesting State become engaged in litigation between the parties. While traditionally there has been a blinkered reliance on undertakings as if enforceable in the State of habitual residence, the English courts are more alert to the need for effective and enforceable measures to be in place before ordering the summary return of a child. It is not uncommon for the courts to ensure that orders in mirror terms are in place as a pre-condition to a return order being implemented.

V. Effectiveness and Enforceability of Protective Measures.

Amicus considers that the approach adopted by the courts of England and Wales and contained in the Guide to Good Practice enables the court to strike the necessary balance between adhering to the fundamental objectives of the Convention while arriving at a bespoke solution in individual cases. Both approaches place emphasis on the court giving due attention to whether the protective (ameliorative) measures available are effective and enforceable. If they are not, they will not mitigate the risk to the child upon return.

Although the principle of mutual respect suggests that the court should place a degree of trust in the

judicial system and mechanism of Member States who are signatories to the Convention, it has long been recognized in English courts that the court can evaluate the differences between legal systems in considering whether to order the return of the child. *See, e.g.*, *Re S* (A Child) [2015] EWCA Civ 2 at ¶ 55. This recognition of differences is not to elevate one legal system above another but instead gives the court discretion to determine if the ameliorative measures will effectively limit exposure to the alleged grave risk of harm.

The UKSC in *Re E* stated that the protective measures available in the country of habitual residence will play a crucial role in the operation of the Convention. The UKSC has long identified that the measures must be "*effective*" to secure the return of the child.[43] The nature and breadth of the protective measures necessary to safeguard the child depends on the nature of the risk that is likely to occur upon return.

In more recent years, the English Court of Appeal has stated that the measures available must sufficiently ameliorate an identified grave risk before the court considers ordering a return. Further, the courts are required to address the efficacy of the measures with care and caution. *See Re C* (Children [2018] EWCA Civ 2834.

The importance of consideration of protective measures in the determination of the Article 13*b*

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[43] *See Re D* (A Child) [2006] UKHL 51, [2007] 1 AC 619; *see also Re E* (Children) [2011] UKSC 27, [2012] 1 AC 144.

exception in the English courts can be viewed from the English Family Court's President's Practice Guidance.[44] At the outset of proceedings, prior to a court hearing, the petitioning parent is required to provide a description of any protective measures that the petitioning parent is willing to offer for the purpose of securing the child's return.[45]

Subsequent cases in the Court of Appeal emphasize that the efficacy of protective measures is essential in assessing the future risk under Article 13*b*. Thus, Lord Justice Moylan in *Re S* (A Child) [2019] EWCA Civ 352, at ¶ 56, states: ". . . Clearly, the more weight placed by the court on the protective nature of the measures when determining the application, the greater the scrutiny required in respect of their efficacy." Significantly, the Court of Appeal in *Re S* (*supra*) acknowledged that the efficacy of protective measures will vary from case to case and from country to country.[46]

In circumstances where a child is ordered to return to England and Wales based on protective measures, the English courts can assist with implementation of these measures on the basis that it is the State of the

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[44] UK Courts and Tribunals Judiciary, *President's Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings* (March 13, 2018), https://www.judiciary.uk/wp-content/uploads/2018/03/presidents-practice-guidance-case-management-mediation-of-international-child-abduction-proceedings-20180227-1.pdf

[45] *Id.* ¶ 2.5(b).

[46] *Id.* ¶ 54.

child's habitual residence and it therefore has jurisdiction to make orders for the protection of the child.

Thus, as illustrated above, protective (ameliorative) measures are central to the approach adopted by the English courts in assessing the risk that is likely to materialize upon the child's return to the country of habitual residence. This focus, however, does not detract from a rigorous assessment such that the court is able to put specific and necessary measures in place in each individual case when ordering the child's return.[47]

CONCLUSION

For the reasons outlined in this Brief, CALA submits that the English approach to ameliorative measures strikes the correct balance between safeguarding the individual child and ensuring that the Convention is not rendered a dead letter by diluting the mandatory duty to return abducted children to their country of habitual residence. Ameliorative measures are an integral part of the English court's assessment as to whether a child is likely to be exposed to a future risk of harm upon return to the country of habitual residence. These measures should either be considered in a staged process, once the court has determined that

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[47] It appears that the Australian approach to accepting undertakings or imposing conditions on return also requires that such conditions are "clearly defined and capable of being objectively measured to determine whether or not they have been fulfilled." *See supra International Parental Child Abduction in Australia*.

such a risk is likely to occur, or as part of a holistic evaluation of the allegations and the evidence. In the former scenario, upon a finding that a child is likely to be exposed to a grave risk of harm upon return to his or her country of habitual residence, the court should then consider whether there are any ameliorative measures available in the country of habitual residence that would sufficiently mitigate the risk and therefore enable the child to be returned. In the latter scenario, the court should factor in the ameliorative measures in its assessment of the risk and reach a conclusion on said risk considering effective and enforceable measures that are available to the court.

Respectfully Submitted,

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