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‘Prompt Return’ Under the Hague Convention on International Child Abduction: The Long and Winding Road of ‘Golan v. Saada’

Justice Sotomayor, writing for an undivided court, in interpreting the Hague Convention on the Civil Aspects of International Child Abduction as implemented by the International Child Abduction Remedies Act, held that a court which finds the return of a child to its country of habitual residence would expose that child to “grave risk of harm” is not then required to examine all possible “ameliorative measures” prior to denying a parent’s petition for return of that child to a foreign nation.

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In their classic song, “The Long and Winding Road,” the Beatles famously sang: “The long and winding road that leads to your door will never disappear, I’ve seen that road before, it always leads me here, leads me to your door …” Commentary on the recent U.S. Supreme Court’s decision in *Golan v. Saada*, 596 U.S. ___, 142 S. Ct. 1880 (2022), rightfully celebrates the unanimity of that court on an issue at the end of a term which was replete with many disquieting examples of the deep divisions among the members of its bench. Here, Justice

Sonia M. Sotomayor, writing for an undivided court, in interpreting the Hague Convention on the Civil Aspects of International Child Abduction as implemented by the International Child Abduction Remedies Act (ICARA) 22 U.S.C. §9001 et seq., held that a court which finds the return of a child to its country of habitual residence would expose that child to "grave risk of harm" is not then required to examine all possible "ameliorative measures" prior to denying a parent's petition for return of that child to a foreign nation. Although the Supreme Court had the final say on what the law requires, it remanded the matter to the District Court to exercise its discretion and to apply "the proper legal standard" as now enunciated by the Supreme Court.

Notably, the remand bypassed the U.S. Court of Appeals for the Second Circuit, one of several Circuit Courts of Appeals that imposed an interpretation of ICARA "which improperly weighted the scales in favor of return" by requiring District Courts, after finding a grave risk of harm if the child were to be returned to their country of habitual residence, to consider all ameliorative measures that are available in that country regardless of the effectiveness or adequacy of those measures, if and when they are applied. Further, of striking importance was Justice Sotomayor's concluding statement that:

> "Remand will as a matter of course add further delay to a proceeding that has already spanned years longer than it should have. The delay that has already occurred, however, cannot be undone. This Court trusts that the District Court will move as expeditiously as possible to reach a final decision without further unnecessary delay. The District Court has ample evidence before it from the prior proceedings and has made extensive factual findings concerning the risks at issue. Golan argues that the ameliorative measures ordered intrude too greatly on custodial determinations and that they are inadequate to protect [the child's] safety given the District Court's findings that Saada is unable to control or take responsibility for his behavior. The District Court should determine whether the measures in question are adequate to order return in light of its factual findings concerning the risk to [the Child], bearing in mind that the [Hague] Convention set as a primary goal the safety of the child."

In order to put the foregoing reference to these unnecessarily protracted delays into context, a review of the facts and related procedural history is required. The parties met in 2014 while the petitioner-wife (Golan, a U.S. citizen) was attending a wedding in Milan, Italy, and where she met the respondent-husband (Saada, an Italian citizen). They married in Italy in 2015 and their son (B.A.S.) was born there in 2016. In July 2018, Golan flew to the United States for her brother's wedding but did not return in August as promised. Instead, she moved into a shelter for victims of domestic violence. In September 2018, Saada initiated in Italy criminal kidnapping charges and a civil proceeding for sole custody of B.A.S. He also filed a petition under the Hague Convention and ICARA in the U.S. District Court for the Eastern District of New York. The District Court found Italy to be the habitual residence of B.A.S. and that Golan had wrongfully kept the child in the U.S. contrary to Saada's rights of custody; however, it also held "that returning B.A.S. to Italy would expose

him to a grave risk of harm," finding that Saada was indisputably "'violent-physically, psychologically, emotionally, and verbally-to' Golan" in the child's presence.

Preceding the precipitating events that had brought the parties to court, "Italian social services, who had been involved with the couple while they lived in Italy, had also concluded that 'the family situation entails a developmental danger' for the [child]," which resulted in a finding by the District Court [that] 'Saada had demonstrated no 'capacity to change his behavior', basing that conclusion on his having "minimized or tried to excuse his violent conduct" when he testified and that his own expert had found that Saada "could not control his anger or take responsibility for his behavior." Yet, despite these and other similar findings, the District Court felt constrained to order the return of the child to Italy based on Second Circuit precedent requiring return to the home country "if at all possible" once a District Court had examined the "full range of options that might make possible the safe return of a child to a home country" as a precursor to a denial of repatriation because a "grave risk of harm exists." The District Court went on to require that the parties "propose 'ameliorative measures' that could form the basis of a "safe return" for the child. The District Court adopted Saada's proposals to pay interim support of $30,000 pending a decision by the Italian courts on the issue of support, to stay away from Golan until custody was resolved by the courts, to withdraw his previously filed criminal charges against Golan, to initiate cognitive behavioral therapy and to waive his rights to legal fees and expenses under the Hague Convention. As a result, the District Court found that these proposals combined with the fact that the parties would be residing separately ameliorated the grave risk for the child in a way that required his return to Italy.

The Second Circuit vacated the order for the child's return, finding that the foregoing measures lacked "sufficient guarantees of performance" and directed the District Court to determine whether there were alternative ameliorative measures capable of being enforced or other means that would be sufficient to "guarantee" that Golan performed as promised and required.

There ensued another nine months of proceedings in the District Court, which resulted in an Italian court issuing a protective order directing Golan to stay away from Saada for one year, requiring an Italian social services agency to monitor Saada's therapy and parenting classes, and requiring that his visits with the child be supervised. As a result, the District Court held that these measures were sufficiently ameliorative, rejecting Golan's position that Saada could not be trusted to comply and ordering Saada to pay Golan $150,000 to facilitate the child's return to Italy and their living expenses while they "resettled" in Italy. The Second Circuit affirmed and Golan appealed to the U.S. Supreme Court.

The Supreme Court's decision reversing and remanding the case to the District Court has several distinct underpinnings. "First, any consideration of ameliorative measure must prioritize the child's physical and psychological safety." "Second, consideration of ameliorative measures should abide the [Hague] Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute"—i.e., the court considering the Hague Convention petition is not permitted to decide the custody case itself in determining whether to direct the return

of the child to its home state. Third and lastly, "any consideration of ameliorative measures must accord with the Convention's requirement that courts 'act expeditiously in proceedings for the return of children' because '[t]imely resolution of return petitions is important … because return is a 'provisional' remedy [designed] to enable final custody determinations to proceed."

There are multiple tragedies surrounding the child who is the subject of this case, the son of the parties, B.A.S. There is the tragedy of his exposure to the abuse heaped upon his mother by his father; there is the tragedy of his having his parents involved in a multiplicity of legal proceedings on two continents; there is the tragedy of the risks to his development occasioned by his mother necessarily seeking shelter in a sanctuary; there is the tragedy that his father may not develop the parenting skills and psychological insights required in order to exercise the kind of parenting time which children require from both of their parents; there is the potential tragedy that the child may be uprooted and returned to Italy after having established a day-to-day (somewhat) normalized life in the United States; there is the tragedy that his mother will continue to live with constant anxiety and fear resulting from her treatment by the father; and, the tragedy of the staggering amount of time, nearly four full years, that this child has had to live with the uncertainty of these ceaseless legal proceedings that have consumed so much of his early childhood.

Assuredly, the District Court will heed the Supreme Court's call for an expeditious resolution of this matter. One can only hope that the parents of B.A.S. and their attorneys will also heed the Supreme Court's admonishment to act quickly.

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