



ANALYSIS

Epilogue: Reaching the End of the Long and Winding Road in 'Golan v. Saada'

On Aug. 31, 2022, U.S. District Court Judge Ann M. Donnelly of the Eastern District of New York issued her decision and order, which provides lawyers with the opportunity to review the end result of the case's protracted proceedings, something that is not always available in those state courts where lower court decisions are not regularly reported and published.

By Alton L. Abramowitz | March 09, 2023 at 11:15 AM

A prior edition of this Divorce Law Column (NYLJ, 8/16/2022, "Prompt Return" Under the Hague Convention On International Child Abduction: The Long and Winding Road of 'Golan v. Saada') focused on

the U.S. Supreme Court’s decision in *Golan v. Saada*, 596 U.S. ___, 142 S. Ct. 1880 (2022), where “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. Section 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.” The Supreme Court remanded the matter directly to the district court (and not to the U.S. Court of Appeals for the Second Circuit) to exercise its discretion and to apply the “proper legal standard.” Following that remand, on Aug. 31, 2022, U.S. District Court Judge Ann M. Donnelly of the Eastern District of New York issued her decision and order, which provides lawyers with the opportunity to review the end result of the case’s protracted proceedings, something that is not always available in those state courts where lower court decisions are not regularly reported and published.

(As an unfortunate and tragic footnote, one and a half months after the decision on remand, the petitioner, 32 year old Narkis Golan, was found dead in her Brooklyn, New York apartment on the evening of Oct. 18, 2022, and her death was under investigation according to the office of the chief medical examiner for New York City. See “Family Questions Death of Domestic Violence Victim Whose Case Made It to Supreme Court Following Yearslong Custody Battle,” by Julianne McShane, 10/26/2022, <https://www.nbcnews.com/news/crime-courts/supporters-vow-continue-fight-deceased-domestic-violence-victim-whose-rcna53966>).

At the outset of her decision on remand, Judge Donnelly clearly and succinctly held: “... that under the circumstances of this case, it is appropriate to consider, as a matter of discretion, whether the existence of ameliorative measures—in this case, the measures already implemented by the Italian courts—make it possible for [the child] to return safely to Italy. Because I conclude that these measures are sufficient to ameliorate the risk to [the child] that I identified in 2019—specifically, being exposed to domestic violence between petitioner and respondent—I conclude that the petition should be granted and order that [the child] must be returned to Italy.” Judge Donnelly then goes into a brief procedural history of the case “to the extent necessary to explain the basis for [her] decision.” She concludes that section of her decision as follows: “The Supreme Court remanded the case so that I could clarify whether I would have considered ameliorative measures as a matter of discretion, and ‘to determine whether the [ameliorative] measures in question are adequate to order return in light of [my prior] factual findings concerning the risk [to the child]. * * *. The court directed me to ‘move as expeditiously as possible to reach a final decision without further unnecessary delay.’ Thus, the Judge clearly signaled her full comprehension of the Supreme Court’s intended purpose for its remand and her receipt of the unequivocal signal from the Supreme Court that the then almost four-year litigation needed to be ended quickly.

Next, Judge Donnelly described the “measures currently in place in Italy,” noting, among other things: the Italian court’s active involvement with both parents, each of whom were being represented by attorneys in Italy; the existence of a “comprehensive” order that mandated certain “measures to facilitate [the child’s] Italian repatriation; the findings of the Italian court that the father had committed acts of violence toward

the mother in the child's presence, which were harmful to the child; the issuance of a protective order to remain in effect for one year following the child's return to Italy; the appointment of Italian social services agencies to conduct what we in New York would term a forensic custody evaluation of the family to include an appraisal of the parties, their parenting abilities, their ability to comprehend the needs of the child, the likelihood that each would acknowledge the role that the other parent plays in the child's life; a psychological evaluation of the child with respect to the need for professional psychological and educational support; "interventions" to assist the parents in identifying appropriate "developmental strategies for the child;" an evaluation of the psychological needs of the father, including psychotherapy and other kinds of support that he would be required to undertake; the provision of supportive psychological assistance to the mother; supervised visitation; encouragement of the parents to work together cooperatively for the sake of the child; and warnings to both parents that the failure to comply with the directives of social services would require that further measures be put into place in order to protect the child.

Before proceeding with a detailed discussion of her findings, Judge Donnelly briefly makes note of the standard enunciated by the Supreme Court, which posits that once there is a finding of "grave risk" to the child in connection with a return to the child's home state, the district court has the option (not a requirement) of considering ameliorative measures in connection with that proposed return. She then states her holding that "the protective order and the \$150,000 payment from [Golan] to [Saada] prioritize and ensure [the child's] physical and psychological safety. Furthermore, by considering the protective order and the monetary payment I have neither usurped the role of the Italian court that will

make the underlying custodial determinations in this dispute or caused any undue delay in the resolution of this return petition. Accordingly, pursuant to the ‘legal principles and other requirements set forth in the Convention and ICARA,’ I conclude that the measures at issue are adequate to protect [the child], even in light of my conclusion that exposing [the child] to [Golan’s] violence toward [Saada] posed a grave risk of harm to [the child].”

Judge Donnelly’s analysis starts by looking at the “ameliorative measures obviously suggested by the circumstances” and reaches the conclusion that those ameliorative measures that were “already in place” would adequately protect the child when in Italy, particularly given the “months of intercession and the implementation of protections by the Italian courts” as stated by the Supreme Court.

The next step in the Judge’s analysis focuses on “prioritizing [the child’s] safety.” She finds that the protective order issued by the Italian court “ameliorates the grave risk of harm to [the child,” noting that the child had not been abused by the father, that the father had not been violent towards the child and had not neglected the child. Noting that the forensic custody expert had said that the father “cared for [the child]”, the Judge goes on to say that mitigation would be present as long as the father’s visits were supervised and if the father received “parental coaching and the parents would not be living together thereby eliminating the opportunities for violence between them. She further notes that the Italian courts had put in place “robust measures” for the safety of the child—i.e., a renewable one-year order of protection, which carried with it stringent sanctions if violated, inclusive of the loss of custody and visitation rights. In addition, the family would be monitored

by Italian social services agencies that were required to report to the Italian court. Lastly, Judge Donnelly noted that the Italian court had ordered the father to provide the mother with \$150,000 to “establish herself in Italy and provide for [the child’s] heightened educational needs.”

Judge Donnelly went on to find that “the disruption resulting from [her] granting” the application for the child’s return to Italy “did not constitute grave risk of harm”, noting the lack of evidence supporting such risk. She points out that the Italian court has the ability to determine whether it is in the child’s best interests to remain in Italy or be returned to the United States in the mother’s custody.

The last analytical segment of the decision focuses on the “deference” required to be given to the “custodial court” (i.e., the Italian court that would be determining custody of the child as between the parents). Judge Donnelly is careful to make it clear that she has not “made any decisions regarding custody, or suggested any such decision to the Italian courts”, reiterating that it is not her role to determine the child’s best interests or to fix the custodial rights of the parties. Importantly, Judge Donnelly declined to conduct the new evidentiary proceedings that the mother had sought because they were in the nature of what matrimonial and family lawyers would term a “best interests hearing”, which are issues to be decided by the courts of the child’s “habitual residence”—i.e., Italy in this instance.

The next to the last topic of the analysis addresses the question of comity and finds that the Italian court is entitled to it because it is one of the “foundational premises of the Hague Convention” and requires our

courts to “respect ... the tribunals of contracting nations.” Here, Judge Donnelly holds that “the best evidence of Italy’s ability to adjudicate the parties’ disputes is the comprehensive decision of the Italian court, which addresses every aspect of the parties’ relationship, and most importantly, recognizes the need to protect the child.”

The final and briefest piece of the analysis stresses the need to avoid any further/undue delay, a topic stressed by the Supreme Court as discussed in the previous column about this case.

The decision concludes with the determination “in the exercise of discretion” that “the ameliorative measures ... are more than adequate to ensure [the child’s] safe return to Italy and grants the petition for that return.

Tragedy and misfortune abound in this case, most notably the untimely death of the child’s mother under circumstances that were being questioned by her family. As has been posited, the four years that it took to reach this end to the Hague Convention proceedings disadvantaged everyone involved—psychologically, emotionally, financially, etc. Most significantly, a child’s life was upended and only time will reveal the full nature and extent of the impact on that now motherless child of what transpired. And, we will never know in the end what the ultimate outcome would have been had the mother survived to raise her child under the ameliorative measures put in place by the Italian courts.

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