

The HCCH Child Abduction Convention and the grave risk exception: A petition for a writ of certiorari is pending before the US Supreme Court - Golan v. Saada

A petition for a writ of certiorari has been filed before the US Supreme Court in a case concerning the HCCH Child Abduction Convention and the grave risk exception (art. 13(1)(b)). The issue at stake is: Whether, upon finding that there is a grave risk that a return would expose a child to physical or psychological harm (or intolerable situation), a district court *is required* to consider ameliorative measures (in other words, undertakings) to facilitate the (safe) return of the child. For the exact wording of the petition, see below.

Please note that US courts often use the terms “ameliorative measures” and “undertakings” interchangeably (as stated in the petition). This petition has been docketed as Golan v. Saada, No. 20-1034. This petition and other documents relating to this case have been distributed for the Conference of today - 1 April 2021.

“QUESTION PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires return of a child to his or her country of habitual residence unless, inter alia, there is a grave risk that his or her return would expose the child to physical or psychological harm. The question presented is:

Whether, upon finding 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 notwithstanding the grave risk finding.”

With regard to this issue, there is indeed a split in the US circuits (as well as state

courts).

According to the petition “The First, Eighth, and Eleventh Circuits have indicated that, once a district court determines that there is a grave risk that the child will be exposed to harm, the court need not consider any ameliorative measures,” whereas “the Second, Third, and Ninth Circuits require a district court to consider a full range of ameliorative measures that would permit return of the child, even when the court finds that there is a grave risk that a child’s return would expose that child to physical or psychological harm.” This case originated in the Second Circuit.

The split in the US circuits has been acknowledged by practitioners, see for example, James D. Garbolino, Federal Judicial Center, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges*, Second Edition (2015), 137-147 (see in particular p. 143. - but a few different circuits are mentioned, which attest to the confusion of practitioners). Accordingly, in my personal opinion, there is definitely merit in raising this issue before the US Supreme Court.

We will keep you informed as to whether this petition is granted or refused.