Golan v. Saada – a case on the HCCH Child Abduction Convention: the Opinion of the US Supreme Court is now available

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Yesterday (15 June 2022) the US Supreme Court rendered its Opinion in the case of Golan v. Saada regarding the HCCH Child Abduction Convention. The decision was written by Justice Sotomayor, click here. For our previous analysis of the case, click here.

This case dealt with the following question: 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. (our emphasis)

In a nutshell, the US Supreme Court answered this question in the negative. The syllabus of the judgment says: "A court is not categorically required to examine all possible ameliorative measures [also known as undertakings] before denying a Hague Convention petition for return of a child to a foreign country once the court has found that return would expose the child to a grave risk of harm." The Court has also wisely concluded that "Nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion" (however, this is different in the European Union context where a EU regulation complements the Child Abduction Convention).

While admittedly not everyone will be satisfied with this Opinion, it is a good and well-thought through decision that will make a great impact on how child abduction cases are decided in the USA; and more broadly, on the way we perceive what the ultimate goal of the treaty is and how to strike a right balance between the different interests at stake and the need to act expeditiously.

In particular, the Court stresses that the Convention "does not pursue return exclusively or at all costs". And while the Court does not make a human rights

analysis, it could be argued that this Opinion is in perfect harmony with the current approaches taken in human rights law.

In my view, this is a good decision and is in line with our detailed analysis of the case in our previous post. In contrast to other decisions (see recent post from Matthias Lehmann), for Child Abduction – and human rights law in general – this is definitely good news from Capitol Hill.

Below I include a few excerpts of the decision (our emphasis, we omit footnotes):

"In addition, the court's consideration of ameliorative measures must be guided by the legal principles and other requirements set forth in the Convention and ICARA. ***The Second Circuit's rule, by instructing district courts to order return "if at all possible," improperly elevated return above the Convention's other objectives***. Blondin I, 189 F. 3d, at 248. ***The Convention does not pursue return exclusively or at all costs***. Rather, the Convention "is designed to protect the interests of children and their parents," Lozano, 572 U. S., at 19 (ALITO , J., concurring), and children's interests may point against return in some circumstances. Courts must remain conscious of this purpose, as well as the Convention's other objectives and requirements, which constrain courts' discretion to consider ameliorative measures
in at least three ways.

"First, ***any consideration of ameliorative measures must prioritize the child's physical and psychological safety***. The Convention explicitly recognizes that the child's interest in avoiding physical or psychological harm, in addition to other interests, "may overcome the return remedy." Id., at 16 (majority opinion) (cataloging interests). ***A court may therefore decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave***. Sexual abuse of a child is one example of an intolerable situation. See 51 Fed. Reg. 10510. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child's safety that could not readily be ameliorated***. A court may also decline to consider imposing ameliorative measures where it reasonably expects that they will not be followed***. See, e.g., Walsh v. Walsh, 221 F. 3d 204, 221 (CA1 2000) (providing example of parent with history of violating court orders).

"Second, consideration of ameliorative measures should abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute. The Convention and ICARA prohibit courts from resolving any underlying custody dispute in adjudicating a return petition. See Art. 16, Treaty Doc., at 10; 22 U. S. C. §9001(b)(4). Accordingly, ***a court ordering ameliorative measures in making a return determination should limit those measures in time and scope to conditions that would permit safe return***, without purporting to decide subsequent custody matters or weighing in on permanent arrangements.

"Third, any consideration of ameliorative measures must accord with the Convention's requirement that courts "act expeditiously in proceedings for the return of children." Art. 11, Treaty Doc., at 9. Timely resolution of return petitions is important in part because return is a "provisional" remedy to enable final custody determinations to proceed. Monasky, 589 U. S., at ___ (slip op., at 3) (internal quotation marks omitted). The Convention also prioritizes expeditious determinations as being in the best interests of the child because "[e]xpedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child." Chafin v. Chafin, 568 U. S. 165, 180 (2013). ***A requirement to "examine the full range of options that might make possible the safe return of a child," Blondin II, 238 F. 3d, at 163, n. 11, is in tension with this focus on expeditious resolution***. In this case, for example, it took the District Court nine months to comply with the Second Circuit's directive on remand. Remember, the Convention requires courts to resolve return petitions "us[ing] the most expeditious procedures available," Art. 2, Treaty Doc., at 7, and to provide parties that request it with an explanation if proceedings extend longer than six weeks, Art. 11, id., at 9. Courts should structure return proceedings with these instructions in mind. Consideration of ameliorative measures should not cause undue delay in resolution of return petitions.

"***To summarize, although nothing in the Convention prohibits a district court from considering ameliorative measures, and such consideration often may be appropriate, a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. The***

court may also find the grave risk so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate. Ultimately, a district court must exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention. A district court's compliance with these requirements is subject to review under an ordinary abuse-of-discretion standard."