International Academy of Family Lawyers

Sofia Appellate Court **File no. 45/2026**

Miladinov

v.

Delidimova

AMICUS BRIEF SUBMITTED BY THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS

INTEREST OF THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS

The International Academy of Family Lawyers (IAFL) was formed in 1986 to improve the practice of law and the administration of justice in the areas of family law and divorce worldwide. It is an international non-profit association that is legally incorporated in the United States of America. Currently, IAFL has more than 1,080 Fellows from 76 countries, all of whom are recognized by the courts and bar associations of their respective countries as experts and experienced litigators in family law.

IAFL members have made presentations in Europe, North America, Australia and Asia related to legal reforms. IAFL has sent representatives to major international conferences, often as non-governmental experts (NGOs), and has observer status for the Special Commissions on the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as the Abduction Convention), to all of which it has sent representatives to. In addition, IAFL members have written extensively and lectured extensively on the Abduction Convention and other related topics, such as cross-border relocation of children.

The IAFL website (www.iafl.com) contains, among other things, a list of its partners.

IAFL has filed *amicus curiae* briefs with the U.S. Supreme Court in the cases of *Cahue v. Martinez*, 137 S. Ct. 1329 (2016); *Lozano v. Montoya*, 134 S. Ct. 1224 (2014) and *Monasky v. Taglieri*, No. 18-935 (2019). And has also done so before the Supreme Court of the United Kingdom in the cases *In the Matter of AR,* (Children) (Scotland) UKSC 2015/0048; *In the Matter of NY*, (A Child) UKSC 2019/0145, and before the Court of Cassation of France, in *Bowie v. Gaslain* (No. T 15-26.664). Other *amicus curiae* filings have also been made to lower courts in various other jurisdictions.

IAFL members, who are experienced attorneys practicing in countries around the world, have summarized the relevant law in their jurisdiction for the purposes of this filing as an Amicus. Counsel for the amicus certify that no counsel for a party authored any part of this brief and no person or entity other than counsel for the amicus have made a monetary contribution to the preparation or submission of this brief.

The Issue raised on appeal:

Article 13b of the Hague Convention: Civil Aspects of International Child Abduction: Interpretation and Implementation.

The stated purpose of the Hague Convention is to promptly return a minor child who was wrongfully removed to or retained in a country that is not his or her habitual residence. The proceeding is to determine the court of jurisdiction to make a custody determination and not to conduct a hearing which determines custody. Thus, the issue of the child's best interest is not before the court in a Hague Convention proceeding but rather it is meant to determine in which jurisdiction will the best interests of the child be determined.

The rule concerning the prompt return of an abducted minor is subject to three exceptions detailed in Articles 12 and 13, with the Article 13b exception being the focus of this brief. The official reporter of the Hague Abduction Convention, Prof. Elise Perez-Vera, addresses the exception to return in paragraph 34 of her official report. "... it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter." ".... this principle requires that .... the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration." *Actes et documents de la Quatorzieme session, Tome III, 6-25 October, 1980, Hague Permanent Bureau of the Hague Conference on private international law, 1982.*

The *Guide to Good Practice* regarding Article 13b of the Abduction Convention, published by the Permanent Bureau of the Hague Conference on Private International Law in 2020 defined grave risk as follows:

"c. Level of "grave risk" The term "grave" qualifies the risk and not the harm to the child. It indicates that the risk must be real and reach such a level of seriousness to be characterized as "grave". As for the level of harm, it must

amount to an "intolerable situation", that is, a situation that an individual child should not be expected to tolerate. The relative level of risk necessary to constitute a grave risk may vary, however, depending on the nature and seriousness of the potential harm to the child."

The parties to the Hague Abduction Convention have applied a narrow interpretation of the defenses in order to maintain a uniform approach to implementing the Abduction Convention. Unlike treaties between states, the Abduction Convention relies on the courts of each party for its implementation. It is thus extremely important for the courts of the various states to adopt a uniform approach, less the Convention become a hodgepodge of different interpretations whose results will vary from country to country. Without accepted principles of implementation, the Convention will cease to be a uniform basis for the prompt return of abducted minors and eventually become a dead letter.

This amicus brief is intended to present to the court an overview of the interpretation and implementation of the Abduction Convention in various jurisdictions.

Israel

The Civil Procedure Rules which apply to the implementation of the Abduction Convention require a specifically higher standard of proof for claims under Article 13b. The standard of a "preponderance of evidence" which is required to prove other claims under the Abduction Convention is insufficient to prove an Article 13b claim. Similar to other jurisdictions in this regard, (such as the United States) a claim under Article 13b requires " clear and convincing evidence". (Rule number 108(b), Family Court Rules of Procedure, 5781- 2020). This is a reflection of the concern of the Israeli Legislator that the stated goal of the Abduction Convention can be undermined by a loose interpretation of Article 13b claims, which would turn an abduction proceeding into a custody determination.

Furthermore, the Rules of Procedure require that the court of first instance issue its judgment no later than six weeks from the date of filing the petition. (Family Court Rules of Procedure, Rule 110(a). Appeals must be filed within seven days of the judgment and the appellate court judgment must be issued within 30 days of the filing of the appeal (Rule 111(a). Limiting the length of the procedure also limits the extent to which a court can conduct investigations or hear evidence on matters not essential to determining which state has jurisdiction to deliberate on custody matters.

The following are representative of the way in which Israeli courts apply the Article 13b defense:

FC (Family Jerusalem) 66292-12-25 *A.C. v. M.K.* (04.03.2026)

This decision, which is one of the most recent, explicitly clarifies that the best interests of the child in the Hague Convention are "special and narrow" and focuses on preventing serious harm from the return itself, in contrast to its broad meaning in regular custody proceedings. The court ruled as follows:

> "With regard to the exception set forth in Article 13(b) of the Convention, according to which 'there is a serious concern that the child's return will expose him to physical or psychological harm or otherwise place the child in an intolerable situation' – it was determined that it should be interpreted, like the other exceptions to the Convention, narrowly and precisely, in order not to empty the Convention of its content."

The starting point is that the very act of abduction, whatever it may be, entails serious damage to the abducted minor who is removed from one of his custodial parents, and that the child's movement from parent to parent, in the course of the commission of an act of wrongdoing, is likely to cause damage and profound harm to the minor. Therefore, it was clarified that such damages, which are understood by their very nature and intrinsic to the act of abduction itself, do not fall within the scope of the exception of the serious actual damage in section 13(b) of the Convention. In order to prove this exception, 'something additional' is required – which creates a special impediment to the minor's return to the country of origin, in order to protect his mental well-being despite the basic purpose of the Convention. See: Civil Appeal (Central District) 56394-10-25 *A.K. v. K.M.* (November 13, 2025) (hereinafter: "The A.K. case.").

In this regard, the words of the Honorable Judge Procaccia in Leave to Family Appeal 1855/08 *Georis v. Biton* (April 8, 2008) (hereinafter – "LFA 1855/08"), on pages 24-25 of the judgment according to which:

> "... Such circumstances, which deal with inherent psychological damage to the child, which stems from the act of abduction and the prolonged separation from the custodial parent, including the natural difficulty of

separation from the abducting parent and the new adaptation environment, do not satisfy, in and of themselves, the exceptional and special condition of a grave fear of "psychological damage" in the sense of the exception to the Convention. If this were the case, most of the abductions would fall within the scope of the exception and justify the non-return of an abducted minor. In order to fall within the scope of the aforementioned exception, "something extra" is usually required, indicating an exceptional difficulty, unique to a particular minor, which creates a special impediment to his return to the country of origin in order to protect his mental well-being. It is also important to emphasize in the context of the requirement for the narrow and strict application of this exception, that difficulties that a child experiences in the process of his return due to his separation from the abducting parent, and in light of his tearing from the new environment to which he has adapted in the country of return, may serve as an immediate reason for conducting renewed custody proceedings in the country of origin, in the framework of which the best interests of the child in its broad sense will be examined in a reassessment. Returning an abducted child to the country of origin does not mean abandoning him on his own; this means that it is returned to a custodial parent who received custody of the child by court orders in light of his considerations of interest. It also means that the court system in the country of origin is also prepared to reconsider the best interests of the child in renewed custody proceedings, in which all aspects of the child's needs will be examined and examined in an up-to-date manner."

Subsequently, it was determined that "the required damage must be clear, unequivocal, and accompanied by conclusive evidence. The severity relates to the risk itself and not to the likelihood of its existence." See: A.K.

The burden imposed on the person claiming an exception under section 13(b) is very heavy and beyond a reasonable doubt. See: LFA 2529/20 *Anonymous v. Anonymous* (April 16, 2020); so that the person claiming the applicability of an exception must point to serious damage based on clear and conclusive

evidence. See: C.A. (Beer Sheva District) 104/08 *Anonymous v. Anonymous* (February 20, 2008); LA 1855/08 supra.

In addition, the case law clarifies that **the exception does not deal with the "best interest of the child"** in the usual and broad sense, as it is examined in custody proceedings, since such a broad interpretation would have emptied the Convention of its content. The term "child's best interest" in the context of this exception expresses "a special and narrow best interest of the child", which focuses on "preventing the child's harm" – that is, preventing serious harm to the minor as a result of his return to his usual place of residence. See: A.K.; CA 4391/96 *Roe v. Roe*, Isr Sup Ct 50 (5) 338 (1997) hereinafter: "**the Roe case**"); DNA 10136/09 *Anonymous v. Anonymous* (December 21, 2009), paragraph 7 of the judgment; LA 2808/15 *Anonymous v. Anonymous* (May 20, 2015), paragraph 3 of the judgment.

The emphasis is on the danger that the child will face if he is returned to the place from which he was abducted – the damage required for the purpose of applying this exception is interpreted as damage that will be caused to the minor by the very fact of his return to the country from which he was removed, and not as a result of his separation from the abducting parent or his return to the custody of the other parent; as determined in this regard in DNA 7259/13 *Anonymous v. Anonymous* (November 13, 2013):

> "... The exception to the Convention applies when there is a risk to the children's well-being, which stems from the very fact of their return to the country and not from the very fact that they are returned to the custody of the parent."

See in this regard APA (Haifa District) 4378-12-20 *A.B. v. G.D* . (December 30, 2020):

> "The vast majority of the appellant's claims regarding the danger to minors are not relevant to the actual return to M., the country where the minors were born and where they lived until their transfer to Israel in May

> 2020 (about seven months ago), but rather to their return to the respondent's custody. The difference between the two is great, as is evident from the extensive case law and the literature regarding the protection from damage in section 13(b) of the Hague Convention Law. While the first reason (danger to the very return to M) justifies the establishment of the damage defense, the second risk (prima facie danger to minors while they are in the Respondent's custody) does not ordinarily establish the said defense."

The test that the court adheres to is the test of the causal connection between the return of the child and the damage that may be inflicted on him. The examination of the exception should be done in a forward-looking manner, focusing on the child's circumstances upon his return to his usual place of residence and whether these circumstances will expose him to a serious risk. As a result, claims against the personality of the "abducted" parent, his parental capacity, or his attitude toward family members are irrelevant in most cases, unless they create an intolerable situation in the usual place of residence. See: A.K.

Thus it was held in this regard in CA 5532/93 *Gunsburg v. Greenwald,* Isr Sup Ct 49 (3) 282 (1995) (hereinafter: "the Gunsberg case"):

> "Article 13(b) of the Convention must be interpreted very narrowly and literally, and therefore the condition for non-return of the children is that there is a grave risk... that the children be exposed... to damage... The burden of proof is on the mother, and its measure is clear and convincing evidence... In England, the degree of damage required to avoid return under Article 13(b) of the Convention has been interpreted as an intolerable situation... Therefore, even if the parent requesting the return of the child is a drug user, homeless and relies on welfare allowances, it is not sufficient to prevent the return of the child. The same applies to a parent who neglected his children in the past. .... Australian case law emphasized the requirement of an "intolerable situation." It is not enough, it was held, to risk mere psychological damage. The condition

for the return of the child is a serious risk of substantial psychological (or physical) damage... The rule that runs like a thread in the aforementioned case law is therefore that the best interests of the child will not be considered in the court that hears the petition for return, but rather in the court in the place where the child is located after his return."

See also APA (Central District) 14752-03-15 *P. v. L. N.* (March 22, 2015), where it was held:

"Based on this, it was held, as an example, that even if the petitioning parent is an alcoholic, a drug addict, lives on a welfare allowance and cannot take care of the child himself, this in itself does not indicate a fear of real harm to the minor." (paragraph 36 of the judgment); and FC (Family Court Krayot) 19298-08-23 R.K. v. N.S. (December 24, 2023), in which an argument for the existence of the aforementioned exception, which was based on allegations of violence or neglect of his father, was rejected."

DNA 10136/09 *Anonymous vs. Anonymous* (December 21, 2009)

This decision of the Supreme Court states that a claim regarding the best interests of the child in the accepted sense is not sufficient to prevent return, and that a hearing on a change in custody rights must take place in the child's habitual place of residence. The court described its analysis on pages 5-6 of the judgment:

"In the past, this court was required to replace the principle of the 'best interests of the child' within the provisions of the Hague Convention, and held that taking into account the objectives of the Convention, the argument regarding the best interests of the child in the accepted sense – in itself – does not prevent the return of a child who has been abducted (see the Gabbay case at p. In this context, President Barak ruled in the Gabbai case:

'The term 'best interests of the child' is not mentioned in the Hague Convention. However,

> it cannot be said at all that the best interests of the child are irrelevant to the purposes of the Convention. It is impossible to deal with the affairs of minors without examining their best interests. Indeed, the basic assumption of the Convention is that the best interests of the child were taken into account and decided at the time the rights of custody were determined. If it is argued that the best interests of the child require a change in custody rights, there is room to discuss it in the child's usual place of residence before he was kidnapped. The position of the Convention is that the abduction of a child should not bring about a change in the place of discussion as to his benefit. On the contrary: the kidnapping of the child is itself something that is liable to harm his well-being.'

In view of all this, this Court held that the rule that guides the court in the matter of the Hague Convention is "the restoration of the situation as it was, on the basis of the assumption that it is the court in the minor's habitual place of residence that will decide on the issue of his custody" (Justice Cheshin in the Roe case, at p. 345).

Of course, it should not be ignored that the Hague Convention establishes four exceptions to the aforementioned rule, including cases in which the mere return of a child who has been abducted to his usual place of residence may harm him. In this situation, the court can rule that a child should not be returned to his or her usual place of residence if it is proven that "there is a serious concern that the child's return will expose him to physical or psychological harm or will otherwise place the child in an intolerable situation." These exceptions express the principle of the best interests of the child within the framework of the Convention, but as was determined in the Gabbai case, we are dealing with a "special

and narrow 'best interest' that is not the usual framework of the best interests of the child that is discussed in determining the right of permanent custody (ibid., at p. 252). In this context, this court further held, by Justice Cheshin:

> "... Let us consider this: This exception does not concern the best interests of the child in the ordinary sense of the term. If that were the case, then the Covenant would be devoid of any real content. The exception concerns the danger that the child will face if he is returned to the place from which he was abducted, all in accordance with the wording of the provision of section 13(b) of the Convention, and in accordance with its spirit" (Matter 26, at p. 346).

LLC 672/06 *Anonymous v. Anonymous* (October 15, 2006)

This decision of the Supreme Court states that the obligation to return the abducted child under the Convention does not contradict the "best interests of the child" in the sense of ordinary custody proceedings.

FC (Family Be'er Sheva) 14830/05 *F.R. v. T.A.A.* (08.12.2005)

This decision clarifies that the realization of the objectives of the Convention requires a deviation from the rules of the best interests of the child that are accepted in custody disputes, and that it is in the best interest of the child in this context that he or she should not be abducted.

C.A. (Jerusalem District) 548/04 *Anonymous v. Anonymous* (06.06.2004)

This decision states that in a proceeding under the Hague Convention, the court does not discuss the question of permanent custody or the best interests of the child in its full sense, but rather its role is to restore the situation to its previous state.

HCJ 4365/97 *Oded Tur Sinai v. Minister of Foreign Affairs* (July 1, 1999)
This decision of the Supreme Court makes it clear that the concept of the "best interests of the child" in the Hague Convention is interpreted narrowly and differently from that given to it in deciding substantive questions such as the right to custody.

CA 7206/93 *Roni Armand Gabbai v. Efrat Gabbai* (February 24, 1997)
This decision of the Supreme Court states that the "best interests of the child" in the Hague Convention are "special and narrow" and are not the usual framework of the best interests of the child discussed in determining permanent custody.

Israeli case law is clear that a defense claimed under Article 13b is not an excuse to turn an abduction case into a custody case. The best interests of the child are not for the court to determine other than in the very narrow definition of grave risk of serious physical or psychological harm. Even when a finding of such harm exists, courts can still exercise their authority to order a return subject to certain undertakings that insure the safe return of the minor until the court of habitual resident is able to make appropriate protective orders.
All abduction cases cause trauma to children. The possible separation of the children from the abducting parent, who may choose not to return, is not the kind of harm contemplated by the Abduction Convention. If the abducting parent, by his or her refusal to return, can create an Article 13b defense, then the Convention would be rendered meaningless. Israeli case law is clear that when determining a Hague Abduction claim, it does not determine custody or weigh considerations that are relevant to custody proceedings

United States

The courts in the United States have consistently held that the defenses under the Hague Abduction Convention are to be narrowly construed.
The United States District Court for the second circuit held that all the defenses, or exceptions, to the obligation to order a child's return are "*to be construed narrowly*". *Ermini v Vittori*, 758 F.3d 153, 161 (2nd Cir. 2015).

Courts have held that the exceptions to the Abduction Convention "*do not authorize a court to exceed its Hague Convention function by making determinations, such as who is the better parent." Blondin v. Dubois,* 189 F.3d 240, 246 (2d Cir. 1999), U.S. federal appeals court.

The District Court of Ohio stated that " *... in proceedings under the Convention, the court's role is not to make traditional custody decisions. It is to determine in what jurisdiction the child should be physically located*, so that the proper jurisdiction can make custody decisions." *Ciotola v. Fiocca,* 86 Ohio Misc. 2d 24.

*"Pursuant to Article 19 of the Convention and section 2(b)(4) of the Act, (*the **United States International Child Abduction and Remedies Act**, ICARA) *a United States district court has the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim.", Friedrich v Friedrich*, 983 F.2d 1396 (6th Cir. 1996) (Friedrich I).

The United States Court of Appeals for the Third Circuit held that for the grave risk exception to apply, the respondent must cite specific evidence of potential harm to the child upon his or her return to the habitual residence. The focus must be on the living situation to which the child would be returned. (*Baxter v. Baxte*r 423 F.3d 363 (3rd Cir. 2005).

According to section 11603 e(2)A of ICARA, *22 U.S.C. 9001 et seq.*, the burden of proof regarding an Article 13b defense is subject to a high standard. The claimant must present "clear and convincing evidence" to support their claim.

The U.S. Supreme Court has expressed the need to take into account the views of the other contracting states.

> "The court's view is also substantially informed by the views of sister contracting states on the issue, see El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176, particularly because the ICARA directs that "uniform international interpretation" of the Convention is part of its framework, see sec. 11601(b)(3)(B). While the Supreme Court of Canada, has reached an arguably contrary view, and French courts are divided, a review of the international law confirms that courts and other legal authorities in England, Israel, Austria, South Africa, Germany, Australia, and Scotland have accepted the rule that ne exeat rights are rights of custody within the Convention's meaning." *Abbott v. Abbott, 560 U.S. 1,3 (2010).*

Quebec, Canada

Introduction

Family law in Canada generally falls within provincial and territorial jurisdiction. Accordingly, each province and territory has adopted its own domestic legislation that implements the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereinafter "the Hague Convention".

Case law is therefore largely province-specific, except for judgments of the Supreme Court of Canada which are binding nationwide.

Québec has implemented the Abduction Convention through the Act respecting the Civil Aspects of International and Interprovincial Child Abduction (A-23.01).

Interpretation of exceptions under the Hague Convention:

Quebec case law is consistent to the effect that, once it is established that a removal or a retention is wrongful within the meaning of the Hague Convention, the judge seized of the application must order the child's return to their State of habitual residence unless the parent objecting to the return shows that an exception applies. The exceptions are exhaustively set out in the Convention, and the burden rests on the parent opposing the return.

Courts have interpreted exceptions restrictively so as not to undermine the Convention's objective .

These principles have been recently reiterated by the Supreme Court of Canada in the case *Office of the Children's Lawyer v. Balev,* 2018 SCC 16:

The exceptions to the rule that the child should be returned to the country of the child's habitual residence are just that — exceptions. Their elements must be established, and they do not confer a general discretion on the application judge to refuse to return the child. Article 13(2) is an exception to the general rule that a wrongfully removed or retained child must be returned to her country of habitual residence, and it should not be read so broadly that it erodes the general rule: see Pérez-Vera, at p. 434. This, however, does not preclude a fact-based, common-sense approach to determining whether the elements of Article 13(2) are established, as discussed below.

The Supreme Court of Canada in *Thomson v. Thomson*, [1994] 3 SCR 551, at para. 596, has also held that the risk must be real and not merely hypothetical, and that the burden is a heavy one.

It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation". The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation .

More recently, the Supreme Court of Canada in *F. c. N.*, 2022 CSC 51, at para. 73 indicated that under Article 13(1)(b), only situations that an individual child should not be expected to tolerate meet the threshold that would be a defense to the principle of automatic return.

In Droit de la famille — 1222, 2012 QCCA 21, the Court of Appeal of Quebec held that "grave risk" requires more than the psychological distress associated with a change of country, a consequence common to virtually every child returned under the Convention .

> [51]Ordering the children's return to the State of their habitual residence necessarily entails a risk of psychological distress. However, that risk—associated with a further change in their living circumstances—is common to most, if not all, children covered by the Act. This is why such a risk cannot amount to the "grave risk" or "intolerable situation" contemplated by the exception. As the Attorney General submits, treating the return itself as a grave risk would lead to an overly liberal application of the exception, which would likely have the effect of rendering the Act ineffective.
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> [52]This argument, moreover, has been rejected on many occasions by the courts. By way of example, it was raised by the abducting parent in Droit de la famille – 2454[6]:
>
> [...]"The appellant continues to argue that returning the children to California would expose them to a 'grave danger,' a 'certain psychological imbalance,' and a 'situation that, in the short and medium term, is at the very least intolerable".[...] '
>
> [53]In response, Justice Chamberland held that this risk was not sufficient for the grave risk exception to apply.[7]:
>
> "Finally, I note that many of the difficulties relied on by the appellant when she speaks of the shock awaiting the children upon their return to California stem from the very fact of their wrongful removal to Canada on January 18, 1996. It is likely that the appellant did not act with ill intent but, rather, according to her perception of events, in the children's best interests. Nevertheless, she took the law into her own hands, in flagrant violation of the custody rights that her husband was then exercising jointly with her; she created a situation such that a return to California, after several months in Quebec, will certainly disrupt the children, to an extent that is difficult to assess and that will depend largely on the parties' own attitude.

Case law in Quebec recognizes the existence of a presumption that administrative, judicial and social authorities of other Contracting States to the Hague Convention are as capable of providing protection to the child following

the return as Quebec authorities. The burden is on the parent opposing the return to demonstrate that the child will not be protected following the return.

See: Droit de la famille — 20778, 2020 QCCS 1839; and

Droit de la famille — 241770, 2024 QCCS 4322.

The interest of the Child

Quebec courts recognize that, under the Hague Convention, a child's best interests are served by protecting them from the harmful effects of international abduction and, where an abduction has occurred, by securing the child's prompt return to their State of habitual residence, where the courts are best placed to determine their custody.

This has been reiterated by the Supreme Court of Canada in F. c. N., 2022 CSC 51:

> [64]The premise that the children's best interests are favored by their timely return to their home jurisdiction is sound. Child abductions harm children (Balev, at paras. 23 25; Ojeikere, at para. 16; A. Grammaticaki Alexiou, "Best Interests of the Child in Private International Law", in Collected Courses of the Hague Academy of International Law (2020), vol. 412, 253, at p. 325). As McLachlin C.J. explained in Balev, "[t]he children are removed from their home environments and often from contact with the other parents. They may be transplanted into a culture with which they have no prior ties, with different social structures, school systems, and sometimes languages. Dueling custody battles waged in different countries may follow, delaying resolution of custody issues. None of this is good for children or parents" (para. 23). Moreover, resolving parenting issues in the children's home jurisdiction fosters stability, while ensuring that custody will be determined by the authorities of the place with which the child has the closer connection, which is an objective set out under s. 19 of the CLRA .

Indeed, the jurisdiction from which the children have been removed is usually in the best position to determine which arrangement will be in their best interests (*Bolla v. Swart*, 2017 ONSC 1488, 92 R.F.L. (7th) 362, at para. 38; *W.D.N. v. O.A.*, 2019 ONCJ 926, 35 R.F.L. (8th) 190, at para. 51; Droit de la famille — 131294, at para. 110). This is explained by the fact that "the courts of the child's State of habitual residence . . . generally will have fuller and easier access to the information and evidence" relevant to making a "comprehensive best interests' assessment" (Hague Conference on Private International Law, 1980 Child Abduction Convention — Guide to Good Practice, Part VI, Article 13(1)(b) (2020) ("Guide"), at para. 15; see also J. M. Eekelaar, "International Child Abduction by Parents" (1982), 32 U.T.L.J. 281, at p. 301) .

This has also been recognized by the Superior Court of Quebec in multiple judgments including in

Droit de la famille — 18205, 2018 QCCS 358

> [39]Interpreting the notion of the child's interest in the broad sense would defeat the purpose of the Act and the Convention. The Court's role at this stage is not to adjudicate custody and access rights, but rather on whether the removal is illegal. The courts of Washington will have the task of determining these rights.

And

Droit de la famille — 22641, 2022 QCCS 1441

> Although not part of the Father's main arguments, the Court will briefly discuss the Child's best interest. The Quebec Court of Appeal in the case of *Droit de la famille* - 122218, analyzed the notion of "interest of the child" in a case involving the illicit removal of a child.
>
> > With respect to the trial judge, she committed an error by bringing the notion of "interest of the child" in a broad sense into the Act. In so doing, she gave an overbroad scope to the exceptions in the Act, whereas they must be applied narrowly.
>
> Section 1 of the Act stipulates that "the object of this Act is to secure the prompt return to the place of their habitual residence of children removed to or retained in Québec or a designated State, as the case may be, in breach of custody rights". The Act's starting assumption is that it is the court in the children's habitual place of residence that is in the best position to rule on the terms of custody that are in the children's best interests. Consequently, the notion of "interest of the child" cannot have the same scope as that which is applied daily by Québec courts in cases involving no foreign elements at all.
>
> The Court, per Chamberland J., acknowledged that, from the standpoint of the Act, the notion of "interest of the child" had to be more limited in scope than that which was generally accepted.

In that regard, note that the interest of the removed child, in the broad sense of this concept as applied in Québec in matters concerning children, is not stated explicitly in the Convention or the Act as a criterion for precluding the objective of the prompt return of the child to the place of his or her habitual residence. Within the meaning of the Convention or the Act, the interest of the removed child is examined from the standpoint –which are undoubtedly narrower- of the few exceptions described therein. The interest of the child, in the broader sense of that notion, will be taken into account when the judicial authorities of the State

of the child's habitual residence rule on custody and access rights, which the Convention does not seek to settle at all.

Thus, the notion of "interest of the child" takes on specific meaning when the Act is to be applied. As mentioned, the best interest of the child coincides with the child's return to his or her habitual place of residence, unless one of the exceptions comes into play. Hence, it is this narrower scope that must be ascribed to the notion of "interest of the child" when applying the Act.

In addition, effective application of the Hague Convention depends on the close and necessary cooperation between the signatory States. By signing the Convention, Québec recognized that the State where the child has his or her habitual residence is in the best position to determine custody rights.

France

In order to comply with the Hague Convention's objective of expediency, France has opted for a procedure known as the 'expedited proceedings on the merits'. This is a procedure that enables a judgment on the merits to be obtained within a short timeframe.

The Court of Cassation, the supreme court of the French judicial system, states that "*pursuant to Article 3(1) of the New York Convention of 20 November 1989, objections to return must be assessed with the best interests of the child as the primary consideration* " (1st Civil Chamber, 14 June 2005, No. 04-16.942; 1st Civil Chamber, 20 March 2019, No. 18-20850; 4 May 2017, No. 17-11031; 25 February 2009, No. 08-18126; 14 June 2005, No. 04-16942; 16 February 2022, No. 21-19061).

French case law adopts a very strict interpretation of the concept of danger within the meaning of Article 13(b) of the Hague Convention and specifies that, in order to assess the existence of a grave reason, the trial judges are required to assess all the alleged facts and to carry out thorough checks to confirm or rule out the serious risk (1st Civil Chamber, 20 March 2019, No. 18-20850; 12 July 2017, No. 17-11840).

Although judges have discretion in assessing the evidence presented to establish this, the Court of Cassation reviews the grounds on which the trial judges conclude that there is a serious risk of the child being exposed to such a situation (1st Civil Chamber, 25 January 2005, No. 02-17411, published; 1st Civil Chamber, 16 February 2022, No. 21-21079).

In particular, the child's integration into their new environment, to which Article 12 of the Convention refers, does not constitute an exception to return (1st Civil Chamber, 4 March 2015, No. 14-13984).

The burden of proof regarding the existence of a grave risk rests with the parent opposing the return (1st Civil Chamber, 26 September 2012, No. 11-17034; 14 February 2019, No. 18-23916).

Thus, mere allegations of violence or alcoholism are not sufficient; they must be proven. Several court decisions illustrate this consistent position:

- *"However, given that the judgment notes, on the one hand, that the allegations made by Mrs X... regarding the father's inability to care for the children, his violence or his alcoholism have not been established, and, on the other hand, that the children have lived in [...] for several months in good material and social conditions, so that, whilst their return will require an adjustment period for both of them, there is no serious risk that this return will expose them to danger or place them in an intolerable situation; that the Court of Appeal, which ruled in the best interests of the children—which lie in maintaining ties with both parents—thus legally justified its decision in light of the aforementioned provisions* ' (Civ. 1st, 28 February 2018, No. 17-17624),

- *'However, given that the judgment finds that it has not been established that Ms E... behaved in an abusive manner towards A...-F... and that the medical documents produced merely reveal the existence, in the child, of feelings of anxiety and sadness linked to the family situation, which her hearing before the court confirmed, so that, despite the refusal expressed by the 10-year-old child, her return to her mother in Spain would not expose her to serious physical or psychological danger nor place her in an intolerable situation; that the Court of Appeal, which ruled in the best interests of the child, thus lawfully justified its decision*" (Civ. 1st, 14 March 2018, No. 18-10438) . (See also Civ. 1st, 12 July 2017, No. 17-11840).

Considerations relating to the health, substance abuse or inadequate parenting skills of the parent who would be responsible for the child's care may also be raised to oppose the child's return; however, once again, the burden of proof lies with the party raising such arguments.

Thus, in a judgment, the Court of Cassation held that:

'in order to rule that there were no grounds for ordering the child's return to Canada, having established that custody was held jointly by the father and mother under Quebec law, the judgment notes that, although Mr Y's parenting abilities are not seriously contested, he is very taken up with his professional activities and that Z..., who has never left her mother, does not know her father, as he returned to Canada two days after her birth and exercised the visiting rights granted to him by the family court judge for only three days, so that there is a serious risk that the child's immediate return to Canada would expose her to psychological harm or,

> *given her very young age, place her in an intolerable situation"; ; 'by basing its decision on grounds that do not serve to establish, in the light of the child's best interests, the serious danger the child would face in the event of immediate return, or the intolerable situation that such a return would create for the child, the Court of Appeal failed to provide a legal basis for its decision" (Civ. 1st, 7 December 2016, No. 16-20.858).*

Similarly, it held that:

> « *Whereas, furthermore, the Court of Appeal, in its sovereign assessment of the facts submitted for its consideration, found that no evidence called into question Mr X's parenting abilities, which had been recognised for several years by the Belgian judicial authorities, and most recently by a judgment of 2 May 2012 establishing the children's residence at his home, on the basis of several expert reports; that, taking into account the best interests of the children, it could only conclude, without having to undertake a futile investigation, that there was no serious risk of danger or of creating an intolerable situation*" (Civ. 1st, 10 July 2013, No. 13-14.562).

With regard to living conditions in the country where the child is located, the Court of Cassation quashed a decision by a court of appeal which, in dismissing the application for return, had held that, '*on the one hand, the family lived in a cramped cabin in Canada, isolated in the forest, without running water or electricity, whereas in France, where they have been attending school since January 2015, the three children have two bedrooms; and, secondly, that Mr X, who claims to be resident in Nelson, British Columbia, without further details, has provided no evidence regarding the material and social conditions in which the children would be received should they return to Canada; that the judgment adds that the children have expressed their apprehension about a permanent return to Canada*".

According to the Court of Cassation, '*by reaching this conclusion, on grounds that fail to establish, in the light of the best interests of the children, the serious danger they would face in the event of an immediate return, or the intolerable situation that such a return would create for them, the Court of Appeal deprived its decision of a legal basis in the light of the aforementioned provisions*" (Civ. 1st, 6 December 2018, No. 18-21141).

A ruling also stated that:

> '*Whereas the judgment notes that the standard of the healthcare system in Israel is very satisfactory, that people with AIDS receive free treatment, that Mica was being monitored in Israel for her HIV-positive status and that the antiviral treatment recommended by the Israeli doctor is the same as that prescribed in France; that he notes that Mr Manashrov, apart from his HIV status, does not suffer from any physical or mental*

condition that could pose a danger to the child should she live with him, and that all drug tests, with the exception of medically prescribed cannabis, have proved negative; that it further states that there is nothing to prevent Ms Nowotny from returning to live with her daughter in Israel, the country of which she is a national; that the Court of Appeal, having carried out the investigations allegedly omitted, without being required to follow the parties in the detail of their arguments, ruled in the best interests of the child, thereby legally justifying its decision on this point; " (Civ. 1st, 4 May 2017, No. 17-11.031).

Similarly, the Court of Cassation dismissed an appeal by a mother who claimed that if the child returned to Japan to live with his father, she risked being deprived of her parental rights under Japanese law and judicial practice (First Civil Chamber, 28 January 2021, No. 20-12213).

Thus, in any event, taking this type of risk into account can only be exceptional: the Court of Appeal is criticised for having, in order to rule that there was no basis for ordering the child's return to the United States, noted that '*if the educational failings alleged by Ms X... against Mr Y... are not substantiated, on the one hand, it would be detrimental to the child, given his very young age, to disrupt his new stability; on the other hand, his return would create difficulties in organising relations with his mother, as she is pregnant and unable to travel in the short term, which would cause the child to relive the trauma of separation and a feeling of abandonment";* according to the Court, *'by basing its decision on grounds that do not adequately characterise, in the light of the child's best interests, the serious danger the child would face in the event of an immediate return, or the intolerable situation that such a return would create for the child, the Court of Appeal failed to provide a legal basis for its decision*" (Civ. 1st, 13 February 2013, No. 11-28.424).

Finally, it is held that the separation of the child from his or her mother does not constitute an intolerable situation if it is merely the consequence of wrongful removal (First Civil Chamber, 16 October 2019, No. 19-19.606).

In conclusion, the Court of Cassation's commitment to upholding the mechanisms of the Convention is reflected in the rarity of decisions upholding a non-return exception.

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Summary

The contracting States to the Abduction Convention have taken the position that defenses are to be narrowly construed. This is particularly so when considering the defense under Article 13b. The criteria for determining a defense under Article 13b is whether the country of habitual residence poses a grave risk of insufferable physical or psychological damage to the minor as the return is to the place of habitual residence and not to the petitioning parent. The issue before the court hearing a petition for return is to determine which country has jurisdiction to make custody decisions and not to make its own custody decisions.

Thus, considerations of the child's best interests are outside the scope of the deliberations of a court determining a petition for return. Given the nature of the Abduction Convention, which is implemented by the courts of each signatory party, it is crucial that there be uniform interpretation of the terms and purposes of the Convention. Courts of the contracting States have clearly held that a return petition is not to be used to determine matters of custody, which are best left to the country of the minor's habitual residence.

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