ASYLUM & ABDUCTION: HOW THE 1980 HAGUE CHILD ABDUCTION CONVENTION CAN BETTER PROTECT MIGRANTS[1]

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The 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereinafter 1980 Convention) sought to create a seamless mechanism by which to return children who have been wrongfully removed from a parent who exercises rights of custody.[2] Today, many courts have been faced with a niche subset of decisions in which an individual has been ordered to return their child to their country of habitual residence while also seeking asylum in a new country of residence. Such an order comes after a court has determined that the child was wrongfully removed, and the left-behind parent successfully shows that the child being taken to another country violates the exercise of their rights of custody. Because asylum cases and return petitions are often decided by different branches of government, courts have had differing approaches in deciding which proceeding governs return.

Member states and the Permanent Bureau of the Hague Conference on Private International Law alike have identified confusion and inconsistencies within and between states on this issue. Since parties to the Convention necessarily retain autonomy surrounding the relationship between the judiciary and the executive branch who decide return petitions and asylum requests respectively, the Permanent Bureau should offer more specific guidance to prevent delays in return and to promote consistent application of the Convention globally. This will guarantee that wrongfully removed children are returned uniformly irrespective of pending asylum decisions. Without further clarity, courts around the world will continue to vary in their application of the Convention.

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1. This piece was modified from research conducted for Professor Linda Silberman, New York University School of Law. Without her guidance, this piece would not have been possible.

2. *See* Caroline Harnois, *1980 Hague Convention on the Civil Aspects of International Child Abduction: The Impact of a Refugee Claim or the Grant of Refugee Status on a Hague Return Application*, 38 C.F.L.Q. 121, 121 (2019) (introducing the history and intent of the 1980 Hague Convention).

I. INTRODUCTION TO THE 1980 CONVENTION

The 1980 Convention was drafted with the intention of protecting children from wrongful removal or retention by one parent while the other still has rights of custody. The drafters of the 1980 Convention concluded that the best interest of a child is best protected when a child is returned to their country of habitual residence, where a court may then make any necessary adjustments to custody agreements.[3] Article 3 of the Convention states that the removal or retention of a child in a new country is wrongful when the left-behind parent is inhibited from exercising the full expression of their custody rights.[4] The Convention gives left-behind parents a right of action to ask a court to consider ordering the taking parent to return the child, which is commonly referred to as a return order.[5] In the event of wrongful removal, the Convention enumerates measures for a wrongfully-removed child to be promptly returned to the child's state of habitual residence.[6] These measures include coordination among Central Authorities designated by each states' federal government, including information sharing and arranging safe return of the child.[7] There are some limitations on the presumption of automatic return of the child, including the limitation in Article 12 that a child may not have to be returned if after a one-year period, a child is settled in a new environment.[8] In addition, Article 13 establishes that the requested state is not required to return the child if the party opposing return shows that the child was removed with consent of the left-behind parent, or if there is a grave risk that return would subject the child to harm or an "intolerable situation."[9] The final exception to return is found in Article 20. This exception explains that return could be refused if not in accordance with "fundamental principles" of the requested State on "human rights and fundamental freedoms."[10] This exception is rarely cited, as courts globally have struggled to understand what would fall in this category.

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3. *See generally* Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (hereinafter 1980 Convention).

4. *Id.*, art. 3.

5. *Id.*, art. 1.

6. *Id.*

7. *Id.*, art. 7.

8. *Id.*, art. 12.

9. *Id.*, art. 13.

10. *Id.*, art. 20.

II. INNOVATIONS IN BRITISH CASELAW

As member states have developed national jurisprudence surrounding the application of this Convention, they have been faced with situations where a taking parent has either applied for or has been granted asylum in the new country. Parties to the Convention discussed this issue at the 2023 Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, but the Conclusions and Recommendations report only urged countries to resolve questions of return and parallel asylum claims promptly, offering no guidance on which order should take priority.[11] Courts have had to decide whether to consider asylum status as instructive in making a decision on return. *G v. G* was a landmark case that came before the United Kingdom Supreme Court in which the Court offered thorough guidance on how courts may balance return proceedings with asylum proceedings.[12] In offering this guidance, the Court essentially said that asylum proceedings take precedence over the presumption for automatic return under the Convention. The purpose of this mechanism stems from the idea that the best interest of the child is to be returned to their place of habitual residence, where an eventual custody determination can be best enacted. Because asylum applicants are protected from refoulement under the 1951 Refugee Convention while their applications are pending, the Court held that they could not order the child's return; in other words, the 1980 Convention and 1951 Refugee Convention must operate simultaneously, even if the enforcement of one hinders the enforcement of the other.[13]

This decision also focused on the fact that an asylum applicant must be permitted to appeal their decision, and this process is inhibited if a parent has had to return to their original country of residence with their child.[14] Acknowledging the slow pace of appeals processes, the Court urged the legislature to make strides towards expediting these processes.[15] The Court followed this recommendation with a swath of other best practices intended to facilitate coordination and communication between relevant governmental actors and the sharing

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11. Conclusions & Recommendations, Eighth Meeting of the Special Commission on the 1980 Abduction Commission, Hague Conference on Private International Law, VII, 1.

12. *See* G v. G (2021) U.K.S.C. 9 (noting that a pending asylum claim should be resolved before a return order against a child can be actualized).

13. *Id.* at 28.

14. *Id.* at 46.

15. *Id.* at 54.

of information within a state among governmental branches. The court urged close cooperation between the executive and the courts in these parallel cases.[16] Even though these solutions seek to minimize delays resulting from staying a return order, they still chip away at the automatic return mechanism guaranteed under the 1980 Convention. This case created a new regime in the United Kingdom in which the resolution of pending asylum adjudications will take precedence over an order for return. This may have significant impacts on global jurisprudence surrounding such parallel claims.

In 2023, a Special Commission met to discuss the application of the Convention, and *G v. G* brought to the forefront the cases in which there are parallel asylum proceedings to a return petition. To prepare for these discussions, the Hague Conference surveyed member states about whether they had run into such issues of applying the convention.[17] Nineteen states answered in the affirmative, and many identified that parallel claims created other problems including concerns about confidentiality, massive administrative delays, and more general issues of whether a child should be ordered to return.[18] The Hague Conference chose to release a discussion paper on the topic to address such concerns, and their main thesis was that enumerated exceptions to return under Articles 12, 13, and 20 are intended to force courts to consider the context and implications of return.[19]

In evaluating the lasting impact of the holding in *G v. G*, one could imagine how this case could overhaul current approaches to how courts apply Article 13(1)(b) grave risk or Article 12(2) well-settled child exceptions in cases with asylum applications. *G v. G* essentially gives asylum seekers who have a pending return proceeding a carte blanche to avoid a return order until the asylum application is decided. This essentially circumvents the power of the Convention, as the asylum process is long and arduous. Thus, the left-behind parent continues to be prevented from exercising their custody rights, and the child is held in limbo in the new country.

III. SURVEY OF NORTH AMERICAN CASELAW

In contrast to British jurisprudence, American courts have generally been hesitant to expand upon the recognized exceptions, and

16. *Id.* at 54-59.

17. Hague Conference on Private International Law, "Discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim," Prel. Doc. No. 16 of August 2023.

18. *Id.* at 3.

19. *Id.* at 4-5.

instead courts consider asylum proceedings within the context of those exceptions.[20] When considering asylum status in a Hague Convention case, courts often look to the well-settled child exception under Article 12(2) or the grave risk exception under 13(1)(b) to determine whether a child should or should not be ordered to return.[21] In contrast to their UK counterparts, they have rejected the idea that a pending asylum application can override or interrupt a return proceeding.[22] The Sixth Circuit in *Salame Ajami v. Tescari Solano* held that a grant of asylum does not tie the court's hands in making a decision on a return order.[23] The court held that despite the grant of asylum, the taking parent failed to present clear and convincing evidence that the case should fall under an exception to the automatic return mechanism under the Convention; thus, the court ordered the child's return.[24]

Courts that are asked to consider whether a child is well-settled in a new place of residence, deportation status or potential to be deported is one factor that a court may consider in deciding whether a child is well-settled, as the ability to be relocated can impact the child's ties with the community.[25] Circuits have varying answers to the question of whether immigration status impacts the well-settled child exception if there is an imminent threat of deportation.[26] The Ninth Circuit held that there must be a concrete threat of deportation in order for immigration status to impact the well-settled child calculus; the Second and Fourth Circuits found that deportation does not need to be looming for immigration status to be considered when deciding if a child is acclimated to a new community; in contrast, the Fifth Circuit found that a child may be considered well-settled even when removal proceedings had been initiated.[27]

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20. *See e.g.*, Miltiadous v. Tetervak, 686 F. Supp. 2d 544 (E.D. Pa. 2010) (highlighting the difference in evidentiary burden between refugee status and exceptions).

21. *See e.g.*, Salame Ajami v. Tescari Solano 29 F.4th 763 (6th Cir. 2022); Ischiu v. Garcia, 274 F. Supp. 3d 339 (D. Md. 2017); Jacquety v. Baptista, 2538 F. Supp. 3d 325 (S.D.N.Y. 2021); Uzoh v. Uzoh, 2012 U.S. Dist. LEXIS 61112 (N.D. Ill. 2012); Karim v. Nakato, 2022 U.S. Dist. LEXIS 90969 (D. Mass. 2022).

22. Sanchez v. R. G. L., 761 F.3d 495 (5th Cir. 2014).

23. Salame Ajami v Tescari Solano, 29 F.4th at 772.

24. *Id.* at 772-73.

25. Alcala v. Hernandez, 826 F.3d 161, 174 (4th Cir. 2016); Hernandez v. Garcia Pena, 820 F.3d 782 (5th Cir. 2016).

26. In re B. Del C.S.B., 559 F.3d 999, 1009 (9th Cir. 2009).

27. Lozano v. Alvarez, 697 F.3d 41, 56-58 (2d Cir. 2012); Garcia v. Padilla, No. 2:15-cv-735-FtM-29CM 2016 WL 881143 (M.D. Fla. 2016); Hernandez v. Garcia Pena, 820 F.3d 782 (5th Cir. 2016).

IV. POLICY IMPLICATIONS

The facts and scenarios surrounding any 1980 Convention case vary drastically. The reasons that lead a parent to bring their child to a new country are numerous, and they fall on a spectrum between desire and necessity. Cases where a parent has filed an asylum claim generally imply that a child was removed from the other parent and the prior place of residence to leave undesirable conditions. While recognizing that urgency is a worthy cause, it is the duty of the courts to abide by legal instruments like the 1980 Convention, especially given that the text of the Convention does allow for exceptions to return that account for many criteria relevant to asylum applications.

Inconsistent applications of international law instruments can create problems of inefficiency and inconsistency, which can lead to forum shopping due to inconsistent outcomes. The stakes are higher in cases that implicate the 1980 Convention, as variation in application can result in severe uncertainty for children and families. The United States has embodied one of the more consistent regimes, as courts have been prone to grant the return of the child aside from the exceptions of grave risk or well-settled child exceptions, but American policy surrounding asylum is anything but predictable. American immigration policy fluctuates between presidential administrations, which impacts the asylum process from beginning to end. Changes in refugee or asylum policy may hinder a child's acclimatization to the new country, when otherwise he may be considered habitually resident there. Changes in policy can impact the perceived security in one's new place of residence, which can both impact the removal proceedings and mental well-being of children and families. While there is clear criteria in the Convention that details what exceptions may apply to the automatic return presumption, in practice, the application of that criteria has varied particularly with respect to immigration status.[28] A proposed solution is the idea that a court may condition the execution of a return order on the ultimate determination of the asylum claim, yet this creates an unfortunate situation, where the child's future is held in the balance, as different government agencies offer conflicting narratives on his eventual fate. In *G v. G*, the court recommended increased coordination among government branches to expedite asylum determinations to prevent delays in resolution of 1980 Convention applications.[29] This is essential in all cases to prevent situations where a child has been ordered to return but is required to wait to see if that return will actually be enforced. This has shown to

28. Harnois, at 121-147.

29. G v. G, at 54.

be a problem in a U.S. case, *Navarro v. Carranza*, in which the return order was granted, yet U.S. Customs and Border Protection prevented the return of the children, thus creating extreme uncertainty in the interim as to the eventual outcome.[30]

Both asylum proceedings and 1980 Convention proceedings fall under the purview of the U.N. Convention on the Rights of the Child, which stresses the need to evaluate and determine what is in the best interest of the child. The 1980 Convention operates under the assumption that automatic return to the country of habitual residence is in the best interest of the child unless one of the enumerated exceptions is satisfied.[31] The UK Supreme Court went one step beyond this, and *G v. G* seems to highlight an assumption that children involved in asylum proceedings have additional vulnerabilities, and their best interest may be to stay return proceedings until asylum status has been determined. Canadian courts have wrestled with this as well; in *Moore v. Moore*, the court stated that ordering a child's return prior to a hearing on refugee status may interfere with the child's rights, yet the court still held that the automatic return mechanism under the 1980 Convention should take precedence.[32] Critics of the 1980 Convention may urge that the best interests of the child would be better protected through a balancing test of the child's interests when determining whether to order return. Such critics would likely prefer the approach of the UK Supreme Court because considering the asylum status of the child adds an additional factor to be considered beyond the enumerated exceptions.

In applying the exceptions to the Convention, an issue that continues to perplex courts and academics alike is the application of Article 20 of the Hague Convention, which authorizes courts to refuse the order of return if it would not be allowed under "the fundamental principles of the taking state relating to human rights and fundamental freedoms." The Hague Conference has intentionally not offered specific guidance on the use of this provision, and parties rarely raise it because of the uncertainty of its application. For example, in the American case *Uzoh v. Uzoh*, the trial court held that the taking parent did not meet the standard of the exception, but the court did not enumerate what would qualify.[33] It is possible that creating specific guidance on the use of this provision could be a means of locating a common ground between people who promote an approach like *G v.*

30. Garbolino, at 163.
31. Hague Conference, at 8.
32. Moore v. Moore, 1990 Carswell Ont 1302 (Ont. Dist. Ct.).
33. Uzoh, *supra* note 21.

G and those who promote a stricter, more textual approach towards exceptions. Rather than abandoning the automatic return mechanism and clearly defined exceptions, outlining justifications for the use of this exception could be an area to include in asylum evaluations. At the same time, cases that would rise to the level of violating a nation's fundamental principles on human rights would likely already satisfy an exception that is more frequently applied and well understood.

The needs of vulnerable children and families must continue to be met through opportunities for refugee or asylum status, but there is an equally urgent need to create consistent jurisprudence, both throughout the United States and around the world. Without this, families will face increased uncertainty and insecurity throughout the proceedings. States and courts alike must begin to agree on what weight to ascribe to different contextual factors, and this common ground likely already exists within the text of the 1980 Convention. *G v. G* stated crucial reminders, like the importance of inter-agency coordination and swift resolution of asylum applications, but these policy concerns must not detract from the initial intention for the child to be returned to their place of habitual residence. It is imperative that courts continue to abide by the automatic and expeditious return mechanism and not allow for extrinsic factors to outweigh this. It is true that seeking asylum or refugee status creates additional vulnerabilities for children, but these vulnerabilities can be accounted for in the existing enumerated exceptions to return. For example, courts can consider what the home environment would be like if the child were to be returned in deciding whether to apply the grave risk exception. By doing this instead of allowing asylum proceedings to delay return proceedings, courts respect the executive branch's ability to make asylum decisions.

Therefore, in offering future guidance, the Hague Conference should urge approaches that balance justice and human rights concerns with expediency and fairness. The best interest of the child is best protected by allowing the courts in the state of habitual residence to decide custody orders and by preventing parents from abducting children for the sake of forum shopping. While children may have a similarly strong interest in eventually seeking asylum in a new state of residence, courts can consider this in determining whether the risk posed falls into an enumerated exception. By straying too far from the existing Convention, courts will likely create further problems for children and families, thus hindering the best interest of the child.