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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BOGDAN RADU Petitioner - Appellee, v. PERSEPHONE JOHNSON SHON Respondent - Appellant.	No. 20-17022 D.C. No. 4:20-cv-00246-RM OPINION

Appeal from the United States District Court
for the District of Arizona, Tucson
Rosemary Marquez, District Judge, Presiding

Argued and Submitted July 1, 2021
San Francisco, California

Before: MURGUIA, R. NELSON and FORREST, Circuit Judges

Opinion by Judge R. Nelson

R. NELSON, Circuit Judge:

Persephone Johnson Shon left her husband in Germany and removed her two minor children to Arizona, where they have resided for the last two years. The Hague Convention of the Civil Aspects of International Child Abduction provides for the prompt return of abducted children so that the country of habitual residence may resolve custody disputes. The district court found the repatriation of the

minor children to Germany posed a grave risk of psychological harm if in the father's custody. To alleviate that risk, the district court ordered that the children be transferred back to Germany in Shon's custody until a German court made a custody determination. While the district court's order is permissible under the Convention, we vacate and remand for the district court to reasonably ensure compliance with its alternative remedy in Germany.

I

Bodgan Radu, a dual citizen of Romania and the United States, married Shon, a United States citizen, in 2011 in California. The couple has two minor children, O.S.R. born in 2013 in the United States and M.S.R. born in 2016 in Germany. The couple initially lived and worked in the United States. In December 2015, Radu traveled to Germany for a contractor job with the U.S. State Department. In March 2016, Shon moved to Germany along with O.S.R. and M.S.R. Shon, Radu, O.S.R., and M.S.R. lived together in Germany in an apartment leased from Inge Frick-Wilden. Shon was a "full-time mom" while living with Radu in Germany.

Shon alleges that Radu abused her and the children after they moved to Germany. According to Shon, Radu constantly yelled and screamed at her about the messy apartment, put her down, and called her profanities. Shon did not trust Radu's parenting because "when he would rage and get angry and mean . . . [h]e

couldn't control himself." Shon provided examples of Radu's rage and anger. In June 2016, Shon unknowingly gave O.S.R. sour milk to drink. In response, Radu allegedly slammed his hand on the table, threatened Shon, and accused her of trying to poison their son. Janet Johnson, Shon's mother, witnessed the sour-milk incident and testified that Radu "exploded all over [Shon] about being a terrible mother." In October 2017, Shon tripped on a stool and spilled broccoli across the floor. Radu allegedly screamed, yelled, and called O.S.R. "bad names, calling him stupid for leaving the stool out" while O.S.R. was "cowering." In March 2018, while Shon was handling bath time for the children, Radu allegedly flung the bathroom door open and slapped O.S.R. across the face. Finally, during a potty-training incident, while Shon was teaching M.S.R., Radu allegedly was "slamming against the door" and yelling for Shon to get M.S.R. to stop crying. Throughout these events, Shon never contacted law enforcement or sought a protective order or other legal remedy while living with Radu. However, she testified that she "was terrified of [Radu]" and "feared retaliation"—that is, he would hurt her or the children.

In March 2019, after Radu allegedly sexually assaulted Shon, she decided that she was not going to stay with Radu. On June 10, 2019, Shon flew one way to Arizona with both O.S.R. and M.S.R. Since Shon's departure, she and the children have resided in Arizona where she enrolled the children in school. Shon later filed

for a divorce in Arizona. Shon has obtained counseling from Sherri Mikels-Romero, a licensed psychotherapist, approximately forty times. According to Mikels-Romero, Shon exhibited symptoms of posttraumatic stress disorder.

On June 8, 2020, Radu filed a Verified Petition for Return of Children to Germany ("Petition") pursuant to the Convention[1] and the International Child Abduction Remedies Act ("ICARA"), Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 22 U.S.C. § 9001 *et seq.*), which implements the Convention. Before filing, Radu contacted various local and national authorities to obtain the return of his children. This included filing a report with the Tucson, Arizona Police Department, contacting the children's school in Tucson, and filing a formal Convention application with Germany. The district court held an evidentiary hearing over three non-consecutive days on the merits of the Petition.

The district court granted Radu's Petition, ordering Shon to return O.S.R. and M.S.R. to Germany. *Radu v. Shon*, No. CV-20-00246-TUC-RM, 2020 WL 5576742, at *1 (D. Ariz. Sept. 17, 2020). The district court carefully considered what type of remedy would safely allow the children to return to Germany. To "mitigate th[e] risk of psychological harm" to the children, the district court ordered an alternative remedy that "Shon shall retain temporary custody and care

[1] We use Convention to refer to the Hague Convention on the Civil Aspects of International Child Abduction (Convention), Oct. 25, 1980, T.I.A.S. No. 11670.

of the children until a custody determination can be made by a German court of competent jurisdiction." *Id.* at *3–4.

The district court made several findings. First, the district court found and Shon conceded that "Shon's removal of the children to the United States, and retention of them therein, was wrongful within the meaning of Article 3 of the Convention." *Id.* at *1. Second, the district court found that Article 12—"if less than one year has elapsed from the date of the wrongful removal or retention and the commencement of the proceedings" the children shall be returned—applied absent an exception. *Id.* at *2. However, the district court found an Article 13(b) exception applied because " the children would be at grave risk of psychological harm if returned to Germany in the custody of Radu." *Id.* at *3. The district court found the "evidence presented at the evidentiary hearing—including the testimony from Shon, Frick, and Johnson, as well as from Radu himself—supports a finding that Radu behaved in ways that could be characterized as psychologically or emotionally abusive." *Id.* At the hearing, Radu testified: "Probably in the heat of the passion, I may have called them [names] a couple of times . . . . So I do regret it, looking in perspective right now. Maybe I should have used a different tone [of] voice or a different type of -- better approach in managing my children."

The district court found the "evidence [] insufficient to show that O.S.R. and M.S.R. would be at grave risk of physical harm if returned to Germany" and there

was "no evidence of any sexual abuse of the children." *Id.* The district court offered to "hold a further hearing upon request concerning the logistics of the children's return." *Id.* Apparently, neither party requested a hearing. Shon appealed and the district court stayed its order pending resolution of this appeal.

II

"The Hague Convention is a multilateral international treaty on parental kidnapping" in force between the United States and Germany. *Holder v. Holder* (*Holder I*), 305 F.3d 854, 859 (9th Cir. 2002). "Federal district courts have jurisdiction over actions arising under the Hague Convention pursuant to 22 U.S.C. § 9003." *Flores Castro v. Hernandez Renteria*, 971 F.3d 882, 886 (9th Cir. 2020). We have jurisdiction under 28 U.S.C. § 1291. *Id.* We review for abuse of discretion a district court's decision to grant or deny a petition for return following an Article 13(b) finding of grave risk of harm. *See* Convention Art. 18 ("The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."); *see also Lozano v. Montoya Alvarez*, 572 U.S. 1, 20 (2014) (Alito, J., concurring); *Baran v. Beaty*, 526 F.3d 1340, 1349 (11th Cir. 2008). "We review the district court's factual determinations for clear error, and the district court's application of the Convention to those facts *de novo*." *Flores Castro*, 971 F.3d at 886.

III

The main objective of the Convention and ICARA, its implementing statute, is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Convention Art. 1. The aim is to "*prevent* parents from wrongfully taking children across national borders in order to shop for a friendly forum in which to litigate custody." *Gaudin v. Remis*, 415 F.3d 1028, 1036 (9th Cir. 2005). "Underlying this aim is the premise that the Convention should deprive parties of any tactical advantages gained by absconding with a child to a more favorable forum." *Holder v. Holder* (*Holder II*), 392 F.3d 1009, 1013 (9th Cir. 2004); *see also Papakosmas v. Papakosmas*, 483 F.3d 617, 621 (9th Cir. 2007). The central question is thus "*whether* a child should be returned to a country for custody proceedings and not *what* the outcome of those proceedings should be." *Holder II*, 392 F.3d at 1013.

A

We briefly recount the procedure for Convention petitions. The "return remedy" is the Convention's "central operating feature." *Abbott v. Abbott*, 560 U.S. 1, 9 (2010). "To that end, the Convention ordinarily requires the prompt return of a child wrongfully removed or retained away from the country in which

she habitually resides." *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020) (citing Convention Art. 12). However, return is not required if the "abductor can establish one of the Convention's narrow affirmative defenses." *Gaudin*, 415 F.3d at 1034–35; *see* 22 U.S.C. § 9003(e)(2). Article 12, Article 13, and Article 20 provide affirmative defenses or exceptions to the return of the child to her habitual residence. "Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (1986).

Most relevant here is Article 13(b), which gives courts discretion not to return the children if "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention Art. 13(b); *see Gaudin*, 415 F.3d at 1034–35. "By its terms, Article 13 does not require a court to refuse return of the child upon the demonstration of one of the article's defenses." *Asvesta v. Petroutsas*, 580 F.3d 1000, 1004 (9th Cir. 2009). The Convention and ICARA "dictate that custody must be determined by the home jurisdiction"—in this case, Germany—"unless the existence of a 'grave risk' truly renders that impossible." *Gaudin*, 415 F.3d at 1036.

If a court decides that the record supports an Article 13(b) defense, it "must proceed to consider whether that risk can be minimized or eliminated through some alternative remedy." *Id.* at 1037.[2]

B

Our controlling precedent on alternative remedies is set forth in *Gaudin*. 415 F.3d 1028. "[B]efore denying the return of a child because of a grave risk of harm, a court must consider alternative remedies that would allow both the return of the children to their home country and their protection from harm." *Id.* at 1035 (internal quotation marks and citation omitted). We explained that the "question is simply whether any reasonable remedy can be forged that will permit the children to be returned to their home jurisdiction for a custody determination while avoiding the 'grave risk of psychological harm' that would result from living with" the petitioning parent. *Id.* at 1036 (citation omitted). We noted a few guidelines

[2] An alternative remedy is a judicial construct not found in the text of the Convention nor ICARA. *See Danaipour v. McLarey*, 286 F.3d 1, 21 (1st Cir. 2002) (citing P.R. Beaumont & P.E. McEleavy, *The Hague Convention on International Child Abduction* 156–59 & n. 183 (1999)). We note that other courts have used different terms to describe an alternative remedy; "undertaking" appears to be the more common term employed. *See Simcox v. Simcox*, 511 F.3d 594, 605 (6th Cir. 2007) (defining "undertakings" as "enforceable conditions of return designed to mitigate the risk of harm occasioned by the child's repatriation") ; *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000) (explaining that the "undertakings approach allows courts to conduct an evaluation of the placement options and legal safeguards in the country of habitual residence to preserve the child's safety while the courts of that country have the opportunity to determine custody of the children within the physical boundaries of their jurisdiction").

for determining whether a grave risk of harm may be mitigated through an alternative remedy: (1) the district court must consider the "effect of any possible remedies in light of circumstances as they exist in the present" meaning "whether a grave risk of harm *now* exists, and if so, whether that risk can be minimized through an alternative remedy" and (2) the district court must not be influenced by or accord weight to any existing custody proceedings. *Id.* at 1036–37.

If a district court makes an Article 13(b) grave-risk-of-harm finding—as the district court did below—the alternative remedy must significantly reduce, if not eliminate, the grave risk of harm to the children. *See Saada v. Golan*, 930 F.3d 533, 541 (2d Cir. 2019) ("The District Court must determine whether there exist alternative ameliorative measures that are either enforceable by the District Court or, if not directly enforceable, are supported by other sufficient guarantees of performance."). To that end, district courts need to determine whether and how the alternative remedy is likely to be performed. *See Walsh*, 221 F.3d at 219 ("A potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings.").

An alternative remedy evaluation in the context of an Article 13(b) finding must consider whether the return remedy is more likely than not to reduce the short-term risk of harm accompanying repatriation, thus protecting the child's

psychological safety. While we do not impose rigid requirements, a district court's evidence-gathering cannot weigh matters or apply measures treading on the ultimate custody determination—*e.g.*, whether the children are better off with one parent or another. *Gaudin*, 415 F.3d at 1036. Nor should the alternative remedy incorporate any long-term considerations or conditions that conflict with the Convention and ICARA. *See* 22 U.S.C. § 9001(b)(4) (providing that the Convention and ICARA "empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims").

The children's interests, not the parents' preference or inconvenience, are paramount to evaluating whether an alternative remedy mitigates the grave risk of harm.[3] Appropriate considerations include the enforceability of the alternative remedy in the foreign jurisdiction based on the availability of legal measures to mitigate the child's risk of harm, reliability of testimony indicating compliance with any court orders or legal measures, as well as history of the parent's relationship, cooperation, and interpersonal communications. *See Saada*, 930 F.3d at 541–42. Any supportive reinforcements that may be necessary should reflect

[3] However, a district court may factor in whether, for example, returning to the children's place of habitual residence would put the safety of the abducting parent at grave risk, and therefore calibrate the alternative remedy. *See Abbott*, 560 U.S. at 22.

these considerations. Accordingly, the district court may solicit any promises, commitments, or other assurances to facilitate repatriation, which may involve directing parents to arrange for legal measures in the foreign jurisdiction—the children's habitual residence. *See id.*; *Danaipour*, 286 F.3d at 15. Indeed, the district court may need to review foreign law to evaluate the reach of that foreign court's authority in issuing legal measures or other relief in support of the alternative remedy.

Radu discusses German Code of Civil Procedure § 328 for its standards on enforcing foreign judgments. An analysis of Germany's pertinent civil laws, and other aspects of its legal apparatus (processes, procedures, and so forth) may inform whether the district court should direct the parties to obtain protective measures abroad or confirm whether domestic orders suffice. But given its limited authority abroad and potential comity concerns, the district court should not make the order of return with an alternative remedy contingent on the entry of an order by the children's country of habitual residence. *See Danaipour*, 286 F.3d at 23.

The district court may also solicit supplementary evidence, and in particular testimony, from the parents on these or related issues to determine the nature of supportive reinforcements. In rare circumstances, oral commitments from one

parent to obey court orders may be enough.[4] Voluntary commitments or agreements—those without third-party intervention—are acceptable depending on the parties' pattern of behavior and the severity of risk of harm to the children (which must be low).

The district court should also, if needed, contact the United States Department of State Office of Children's Issues to coordinate legal safeguards or otherwise procure assistance from the foreign jurisdiction to address or resolve any issues animating the Article 13(b) grave risk of harm finding. *See* Convention Art. 7 (listing measures available through Central Authorities).[5] Logistical arrangements such as financing the return of the children or securing housing or temporary placement should not undermine the alternative remedy. The options are extensive, but this framework provides the guideposts for navigating the provisions of the Convention and ICARA and creating a reasonable remedy for a

[4] Radu testified that he would follow the district court's order. It is difficult to assess whether such testimony is enough to sustain the alternative remedy without additional facts. Notably, there is no restraining order, criminal adjudication, or other court judgment indicating either Shon or Radu poses a risk to the children requiring law enforcement. This may suggest an increased likelihood of performance and therefore reduced need for multiple supportive reinforcements.

[5] Central Authorities, such as the Department of State's Office of Children's Issues, are empowered to engage in several activities including "to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child." Convention Art. 7(h).

short-term period. The district court may also consider activity in the children's habitual residence, including criminal proceedings, if it could significantly interfere with implementing the supportive reinforcements and otherwise reduce the likelihood of performance.[6] Supportive reinforcements generally should be limited in scope and thus not extremely burdensome to either party to avoid litigation over the merits of custody issues. Resolving the parameters of safe repatriation of the children is paramount.

IV

With this governing framework outlined, we turn to the merits of the district court's order to return the children. On appeal, Radu does not properly challenge the district court's finding that his children would face a grave risk of psychological harm if returned to Germany, even though the facts here do seem to be a borderline case whether an Article 13(b) finding is warranted. *See Gaudin*, 415 F.3d at 1037 ("[B]ecause the Hague Convention provides only a provisional, short-term remedy in order to permit long-term custody proceedings to take place in the home jurisdiction, the grave-risk inquiry should be concerned only with the degree of harm that could occur in the immediate future."). The focus of our

[6] Radu wrote that there are "pending police dockets" in Germany related to the "disappearance of [his] children." Whether further inquiry is appropriate, particularly where it poses obstacles to advancing the alternative remedy, is for the district court to determine.

inquiry here, however, is the alternative remedy based on the district court's findings. We vacate and remand the alternative remedy order since the record does not adequately support whether the order of the children's return in Shon's custody has a high likelihood of performance through supportive reinforcements.

A

Shon argues that where an Article 13(b) finding is made, the petitioning parent (here, Radu) bears the burden of "adduc[ing] any evidence on the enforceability of American alternative remedies in Germany." We decline to allocate a burden of proof on the reasonableness of an alternative remedy.[7] Congress is capable of assigning burdens of proof and has already done so under ICARA. *See* 22 U.S.C. § 9003(e)(2). We need not add judicial constraints absent from ICARA or the Convention. To be sure, the reasonableness of the remedy originates with the district court having authority to request any information from the parties. The district court is in the best position to assess a parent's willingness to respect court orders and craft the alternative remedy accordingly.

Our framework enables a district court to craft the remedy with enough flexibility to account for the likely idiosyncratic nature of the parties' relationship

[7] *But see Acosta v. Acosta*, 725 F.3d 868, 877 (8th Cir. 2013) ("As the petitioner proffering the undertaking, [petitioner] bears the burden of proof.") (citation omitted); *Simcox*, 511 F.3d at 611 ("[T]he burden for establishing the appropriateness and efficacy of any proposed undertakings rests with the petitioner.").

without mandating a new evidentiary burden. On appeal, Shon alleged concerns about her "immigration status" impacting her ability to live in Germany with the children or "work in Germany to financially support herself and the children." At a minimum, practical considerations should be substantiated by the party asserting them as that furthers efficient resolution and discourages potential dilatory conduct.

Shon also argues that the alternative remedy "is overbroad and exceeds the scope of the lower court's authority" because it requires her to move to Germany, "orders the children to remain" in her custody, and "implicitly requires [her] to file a custody case in Germany and the German court to act on it." The Convention, however, presumes relocation of the children to facilitate repatriation. *See Abbott*, 560 U.S. at 20 ("Ordering a return remedy does not alter the existing allocation of custody rights, but does allow the courts of the home country to decide what is in the child's best interests.") (internal citation omitted). If relocation of the abducting parent (or a responsible family member) can help alleviate any grave risk of harm from repatriation of the kids, the district court retains that discretion.

Because Shon wrongfully removed the children, as she conceded, the district court in no way exceeded its authority to mandate the children's return to Germany accompanied by Shon. But in the context of an Article 13(b) finding, the district court needed a fuller record to have sufficient guarantees that the alternative

remedy will be enforced in Germany. As stated above, there are multiple resources the district court may engage, including assistance via the U.S. Department of State, to fulfill the Convention's presumptive goal of the speedy return of the children. That Germany is a treaty partner with the United States already informs baseline expectations. *Id.* ("International law serves a high purpose when it underwrites the determination by nations to rely upon their domestic courts to enforce just laws by legitimate and fair proceedings."). We must respect that another treaty partner—a contracting State to the Convention—is well-equipped with the proper legal mechanisms and internal processes and procedures to support alternative remedies and otherwise fulfill treaty obligations.

We recognize that abuse exists on a spectrum depending on the form, frequency, and other features. *See Simcox*, 511 F.3d at 605; *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001). But an Article 13(b) grave risk of psychological harm finding does not automatically terminate further investigation into a reasonable alternative remedy. In fact, there is longstanding practice among our foreign counterparts, *see Abbott*, 560 U.S. at 16–17, to order return of the children despite objections by the abducting parent in situations of physical or psychological harm or alternatively consider remedies to mitigate a grave risk of

harm upon repatriation.[8] The framework detailed above accommodates the fact-intensive nature that undergirds the fashioning of an alternative remedy upon an Article 13(b) finding and affords the district court the latitude to tailor it in light of more troubling factual scenarios.

V

Resolving international child abduction is at the forefront of the Convention. We are not blind to the emotional consequences, disruptions to livelihoods, and changes in routine that arise in physically moving children across international borders when a grave risk of psychological harm looms. But alternative remedies are consistent with the Convention's goal to accomplish children's repatriation

[8] *See* Oberlandesgericht Dresden [OLG] [Higher Regional Court] Jan. 21, 2002, 10 UF 753/01 (Ger.); *see also RS v. BS* [2005] NZFC 61 at [37] (N.Z.) (concluding that "it is not sufficient for a respondent to make allegations of domestic violence and/or sexual abuse or even to satisfy the Court that such claims can be substantiated" and that "[i]n addition to the Court being satisfied of such matters it must also be satisfied that the U.S. justice system would not be able to deal with the stated allegations in a way that placed due consideration upon the best interests of the child"); *Re: 'H' Children* [2003] EWCA (Civ) 355 [37] (Eng.) (resolving "mechanics of the return" of the mother with the children to include "set[ting] aside" prior court order "giving sole parental rights to the father" and establishing "[s]ome clear understanding between the father and mother as to how and in what circumstances the father should see the children prior to any decision by the Belgian court" and "[i]f it can be arranged, either a hearing before the Belgian Court . . . to take over control of the future of these children as soon as possible after their return"); *C v. B* [2005] EWHC (Fam) 2988 [62] (Eng.) (concluding that the "proper solution . . . is for the court to order return so that the Australian court can reconsider the position . . . of the mother" who raised concerns about her mental health and other welfare considerations if the court ordered return).

while also protecting them from harm. There are multiple routes the district court may take to support an alternative remedy that satisfies the reasonableness standard—a likelihood of performance advanced through supportive reinforcements. The district court can be assisted by the U.S. Department of State, especially if foreign cooperation and protective measures are needed.

Consistent with the goals of the Convention, this litigation should conclude as quickly as possible. The district court shall expedite consideration of the case. Any subsequent appeal shall be assigned to this panel and either party may move for an expedited briefing schedule on appeal.

VACATED AND REMANDED.