Migration, abduction and children's rights: the relevance of children’s rights and the European supranational system to child abduction cases with immigration components

Florescu, A.S.

5 Contemporary Dilemmas

Determining The Relevance of Children's Rights to Primary Carer Abductions, Domestic Violence and Immigration Cases

5.1 Introduction

This dissertation has so far focused on the rights of children, first from the perspective of the CRC and subsequently as understood under the Child Abduction Convention. It has been shown that the rights of children are primarily used to justify the Convention's policy of return. Simply put, as a matter of policy, the premise is that it is best for children in general to return to the country where they have lived their entire life. Individual children's rights may be considered within the exceptions to the return of the child.[1] In practice, individual children's rights challenge the policy considerations of the Convention particularly because they are raised to oppose the return of the child to the country of habitual residence. It has been stated on numerous occasions that the success of the mechanism rests precisely on its simplicity and the fact that substantive custody litigation considerations have been left out of the Convention.[2] In this light, commentators have argued against an individualised assessment of the rights of children on the ground that such an assessment goes against the prompt return mechanism and could undermine the value of the Hague Convention.[3]

However, it is precisely this simplicity, and arguably the limited engagement of the child abduction courts with the sociological shift in the profile of the abductor, that has generated criticism of the Child Abduction Convention. For example, to date, there has been little dedicated attention to how or if children's rights can inform the assessment of the allegations of separation of the child from the primary caretaker.[4] Similarly, allegations of domestic violence have been dealt with principally from the perspective of the parent and not as a child rights issue. There is a wealth of literature on the interaction between child abduction and domestic violence, focusing on

---

1 Chapter 4 has also discussed the relevance of children's rights for the assessment of habitual residence, and it has shown that it is possible to include substantive rights considerations even outside the exceptions to return; however as the same Chapter has discussed the individual children's rights considerations remain primarily relevant for the exceptions to return.

2 Bruch 1996, p. 55, Vivatvaraphol 2008, p.3336, Beaumont/McEleavy 1999, at 229.

3 Anton 1981, p. 553; Silberman 1994, p. 33;Walsh/Savard 2006, p. 33.

4 There have been some recent works looking into how courts have dealt with the issue of the separation of the child from the taking parent. See for eg. Van Hof/Kruger 2018. This contribution and others where it was argued that the CRC position has been taken into account lack a comprehensive assessment of how children's rights have been conceptualised under the CRC. This dissertation has carried out this analysis in Chapters 2 and 3.

how this affects the taking parent.[5] Nevertheless, an overview of the Hague Conference's Guide to Good Practice on Article 13(1)(b) indicates that many of the exceptions to return relate more directly to the taking parent than to the child. The risk of domestic violence, criminal prosecution upon return, the lack of access to a court, the financial status of the parent, the immigration situation of the parent, are all defences where a grave risk to the child has been raised, but where it is difficult to entertain the allegations without a broader look into the situation of the taking parent. In other words, the grave risk to the child is intersectional: it juxtaposes the parent child relationship, a foreign legal system and the taking parent.[6] While there is a rich body of literature on the relationship of domestic violence and child abduction, no such dedicated attention has been given to the other exceptions to return raised.

This Chapter addresses the principal exceptions to the return of the child which do not *prima facie* concern children: domestic violence, separation from the primary carer and immigration considerations. Section 5.2 analyses the concept of domestic violence as it has emerged in feminist literature and subsequently from the perspective of children's rights. Section 5.3 discusses the relevance of domestic violence to child abduction cases. Section 5.4 addresses the topic of primary carer abductions first against the change in the sociological profile of the abductor and second as it has been brought within child abduction proceedings. Section 5.5 presents substantive discussions around immigration law and how it influences the power balance in family litigation in general and Section 5.6 deals with the way immigration considerations have been brought within child abduction proceedings. Finally, Section 5.7 concludes this chapter.

5.2 Substantive considerations regarding domestic violence

5.2.1 The meaning of domestic violence

Discourses around the concept of domestic violence, – also known as intimate partner violence (IPV) – have dramatically changed over the past 50 years.[7] Originally, violence within the family largely fell within the domain of private affairs, the home and the family escaping the regulatory powers of the state.[8] Under the influence of liberal philosophy of the nineteenth century, the family was construed as a *private* space, a sanctuary free

5 Masterton 2016; Freeman/Taylor 2020; Trimming/Momoh 2021; Bruch 2004; Lindhorst/Edelson 2012; Salter 2014; Gray 2023; Weiner 2021.

6 Intersectionality is used here as coined by Crenshaw who used it as a lens for understanding the multiple identities of individuals: See Crenshaw 1991.

7 Johnston/Steegh 2013, p. 63.

8 Moore 2003, p.95.

from state intrusion.[9] The *public* space on the other hand represented the domains where state intervention was allowed and included the government, politics, or the workplace.[10] The public-private dichotomy justified the non-intervention of the state in family affairs and this was reflected in the overall response of the state system to abuse. Domestic violence was not considered a criminal offence, nor was marital or date rape, no available remedies existed for stalking or harassment post-separation, and family courts were poorly equipped to address allegations of violence in divorce and custody proceedings.[11] Even the most egregious forms of violence such as the murder of a spouse did not always result in prosecution on account of the 'private nature' of such violence.[12]

Feminist scholarship challenged the public-private divide and social studies exposed the propensity for violence of the 'family home', indicating that most of these victims were women.[13] Gradually, under the influence of feminist academic literature, the private dimension of violence was recognized in international instruments. For example, Article 1 of the 1993 U.N. Declaration on the Elimination of Violence against Women defined violence against women as: "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in *private* life [*emphasis added*]".[14]

The earlier UN Convention on the Elimination of All forms of Discrimination Against Women (the "(CEDAW) Convention"), adopted in 1979 by the UN General Assembly and in force since 1981, does not include any provisions regarding gender-based violence. Within the CEDAW system, violence against women has been considered a specific form of discrimination against women and it has been condemned as such in later Recommendations of the CEDAW Committee.[15] General Recommendation no 19 of 1992 is particularly relevant as it deals specifically with violence against women.[16] Paragraph 6 of this General Recommendation links discrimination with gender-based violence. Violence against women is defined as "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty." The same instrument clarifies that state responsibilities extend to violence perpetrated by private individuals.[17]

The interpretation of the CEDAW Convention has thus evolved to encompass gender-based violence as a specific form of discrimination

9 Moore, p. 95.
10 Moore, p. 95.
11 Johnston/Steegh 2013, pp. 63-64.
12 Chinkin 1999.
13 For example Thomas/Beasley 1995; Chinkin 1999; Kelly 2003.
14 Adopted by the General Assembly Resolution 48/104.
15 Simonovic 2014.
16 *CEDAW Committee General Recommendation No. 19: Violence against women* 1992.
17 *CEDAW General Recommendation No. 19 (1992),* para 9.

against women. Domestic violence is also prohibited in several binding instruments, most notably the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, adopted at Belem Do Para, Brazil in 1994, in force since 3 May 1995[18] and the Council of Europe Convention on preventing and combating violence against women and domestic violence (the "Istanbul Convention"), adopted in Istanbul, Turkey in May 2011, in force since 1 August 2014.[19] Under Article 3 (b) of the Istanbul Convention domestic violence "shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim."

Over time, a wealth of research has been dedicated to intimate partner violence (IPV), delineating various types of IPV, such as intimate terrorism or violent coercive control,[20] and situational couple violence.[21] Violent coercive control has been understood as comprising a pattern of tactics whose main aim is to exert control over a partner and it includes physical or sexual assault, intimidation, isolation or any other means to coerce a partner in a behaviour they would not otherwise adopt.[22] On the other hand, situational couple violence does not take place with the aim to control a partner, rather it is provoked by situations of conflict, anger or frustration.[23] It has also been argued that situational partner violence is perpetrated by both men and women, whereas coercive control is a form of gender-based violence, perpetrated primarily by men against women.[24] Stark has coined the term coercive control, and he has posited that the key dynamic of coercive control is the deprivation of a woman's autonomy in the context of an abusive relationship.[25] Stark has argued for a broader conceptualization of violence against women beyond safety to take into account women and children's freedom.[26] For him, the lack of understanding of control and how it is being exercised in an abusive relationship was a key factor in the authorities' poor response henceforth to cases of domestic violence.[27]

---

18 << https://www.oas.org/juridico/english/sigs/a-61.html>>, last accessed on 18 May 2023.

19 Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), in force since 01 August 201. See also, <<https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence#:~:text=The%20Convention%20entered%20into%20force,and%20a%20form%20of%20discrimination>>, last accessed on 18 May 2023.

20 Kelly/Johnson 2008.

21 Kelly/Johnson 2008; Brenda Hale has pointed that the distinction between situational couple violence and intimate terrorism is primarily drawn in North American scholarship. See Hale 2017, p. 15.

22 Kelly/Johnson 2008.

23 Crossman e.a. 2016, p. 455 referring to Ansara/Hindin 2010; Graham-Kevan/Archer 2003; Johnson/Leone/Xu, 2008.

24 Crossman e.a. 2016, p. 455.

25 Hanna 2009, p. 1458.

26 Stark 2009. See also Downes e.a. 2019, p. 269.

27 Stark 2009.

More recently, social studies have also indicated that coercive control can exist without violence (non-violent coercive control) and that the effects on the victim-survivor of non-violent coercive control are similar to the ones of intimate terrorism.[28] Non-violent coercive control also poses additional challenges as legal systems overall do not consistently acknowledge coercive control as domestic violence.[29] It has been argued that, particularly for upper socioeconomic status relationships, violence is usually suppressed and control is extreme.[30]

Social science literature is abundant with examples of acts that alone or taken together can amount to coercive control.[31] In the United Kingdom, where coercive control has been criminalised since 2015, the House of Commons defined controlling behaviour as: "a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour."[32]

Empirical research has indicated that a couple's separation increases the risk of violence.[33] Separation increases the risk of physical violence, even if physical violence did not exist during the relationship.[34] Control post separation is also manifested through the use of custody proceedings and contact arrangements with the child.[35]

5.2.2 Domestic violence and children

Feminist scholars have argued for a conceptualization of domestic violence as a particular form of gender-based discrimination. Academic literature is abundant on the effects of domestic violence on women; children have generally been considered indirect or collateral victims of abuse, especially if there is no evidence of direct violence upon them.[36] Difficult questions on how to account for the position of children or their rights have arisen particularly in post-separation parenting disputes on custody and parental

28 Crossman e.a. 2016, p. 467.
29 Crossman e.a. 2016, p. 468. The United Kingdom is an example where coercive control has been criminalized under Section 76 available at <https://www.legislation.gov.uk/ukpga/2015/9/contents/enacted>, last accessed on 20 March 2024.
30 Meier 2015.
31 Lux/Gill 2021, pp814-824, with further references.
32 Monk/Bowen 2021 referring to House of Commons (2013) Home affairs section, Domestic Violence: A Library Standard Note to Extend the Cross-Government Definition of Domestic Violence, London: Library Standard Note, 6337.
33 Johnson e.a. 2014; Ornstein and Rickne 2013; Spearman e.a. 2023.
34 Brownridge 2006; Gutowski/Goodman 2023.
35 Van Horn/McAlister Groves 2006; see also the research of the Canadian Government https://www.justice.gc.ca/fra/pr-rp/jp-cj/vf-fv/freevf-rfcsfv/p4.html; Crossman e.a. 2016, p. 468.
36 See among many authorities: Gonzalez e.a. 2016.

responsibilities.[37] As discussed in Chapter 3, one interpretation of the right of the child to have contact with both parents has resulted in a focus on the parental alienation syndrome to the detriment of allegations of violence against children.

The assessment of the impact of violence on children has been further complicated by the different types of violence to which children are exposed to, from physical to non-physical forms and by the severity of the conflict or the child's gender or age.[38] As mentioned above, if at all, it was considered that children were indirect victims of violence and that exposure to violence caused various emotional and behavioural harms in children.[39] According to the World Health Organisation "Children who grow up in families where there is violence may suffer a range of behavioural and emotional disturbances. These can also be associated with perpetrating or experiencing violence later in life."[40] Much of the academic literature portrays children as witnesses of domestic violence and focuses on the long-lasting impact of witnessing domestic violence on children's current and future well-being.[41] Definitions of domestic abuse largely exclude children as direct victims of such abuse.[42] Failure to include children as direct victims in national legislation, has many implications such as for example the unavailability of mental health and other forms of support destined for domestic violence victims/survivors.[43] Also, even if in the United Kingdom coercive control has been criminalised, the legislation does not allow children to be victims of such forms of violence.[44]

Nevertheless, from a children's rights perspective, children can be *direct* victims of domestic violence. Article 19 of the CRC offers a wide understanding of violence against children to include "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." In General Comment no. 13, the CRC Committee adopted an extensive definition of violence to include any form of mental violence, including domestic

37 Ver Steegh 2004.
38 Ver Steegh 2004, p. 1386 with further references.
39 Kolbo et.al. 1996; Edleson et.al. 2007.
40 <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>, last accessed on 18 May 2023.
41 Callaghan e.a. 2018, p. 1554, and the studies cited therein. "The representation of children in situations of domestic violence as passive *witnesses* rather than as people who directly *experience* violence and coercion is reproduced in academic and professional discourses. We recently completed a review of 177 articles published between 2002 and 2015, focused on children who have experienced domestic violence (Callaghan, 2015). A total of 85% of these articles described children as "exposed" to domestic violence, and 67% used the term 'witness'."
42 Callaghan e.a. 2018, p. 1554.
43 Callaghan e.a. 2018, p. 1554.
44 Katz 2022, p. 41.

violence.[45] Also, the CRC Committee has condemned all forms of physical violence in the family, including corporal punishment.[46] Even if the CRC Committee does not further define domestic violence, its overall expansive approach can be interpreted to include as a form of psychological violence situations where children were not directly assaulted, but rather witnesses of violence against a parent.

The Istanbul Convention also recognizes children as direct victims of domestic violence in situations where they have witnessed the violence in the family.[47] Further, the Istanbul Convention mandates states to take into account incidents of domestic violence in the determination of custody and visitation rights. Paragraph 2 mentions in particular that visitation or custody should not jeopardise the rights and safety of the children or of the victim.

Recent scholarship has equally proposed that children are direct victims of coercive control, irrespective of whether they had been physically abused.[48] Empirical research has revealed that children are directly involved in controlling tactics, including isolation and blackmailing, and can be used by abusers to minimise, legitimise and justify violent behaviour.[49] It has been suggested that "the exercise of power in abusive and controlling relational dynamics can be most troubling and distressing for children."[50] Children experience coercive control similarly to adults and consequently they are not merely indirect victims or witnesses of domestic violence.[51] It has been further argued that the experiences of children with domestic violence should inform family courts' post-separation parenting decisions and in particular the presumption in favour of ongoing contact, which is a significant factor enabling post separation domestic violence.[52]

Clearly, children's rights scholarship and international instruments view domestic violence as a child rights issue. However, it is also important to highlight that the children's rights and feminist perspectives on domestic violence are not entirely overlapping. The initial inclusion of children who witness violence as direct victims of abuse has been credited to feminist scholars.[53] Feminists at the time were arguing for including domestic violence among the factors for the best interests determination in private

45 CRC Committee (2011). General Comment No. 13: right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13, Para 21 (e) (GC No. 13).
46 GC No. 13, *para 22 (a);* Tobin and Cashmore have noted some definitional shortcomings in the General Comment no 13 in that the Committee does not clearly distinguish among various types of violence, such as maltreatment or abuse Tobin and Cashmore 2019.
47 As per the Preamble; see also Article 18 (3); Article 26.
48 Katz e.a. 2020; Callaghan e.a. 2018.
49 Johnson 2009; Stark 2009.
50 Callaghan e.a. 2018, p. 1572.
51 Katz e.a. 2020, p. 310.
52 Katz 2022, p. 334-335.
53 Houston 2017, p. 97.

custody litigation.[54] When children were not the direct victims of physical violence, it was proposed that they could become victims of harm in several important ways. On the one hand violence gave them an unhealthy perspective on relationships.[55] On the other hand, domestic violence against mothers impaired their ability to care for their children, resulting in a direct link between child abuse and spousal abuse.[56] Further, it was shown that spousal abuse could have a wide range of psychosocial consequences for children, including for example low self-esteem or depression.[57] The acceptance of this argument however had the unwanted effect of inviting social services interventions into the family as exposure to domestic violence resulted in child neglect.[58] As exposure to domestic violence was assimilated to a form of child neglect, children required protection from their mothers as well, if the child protection services demonstrated (1) a harm or risk of harm to the child and (2) a causal link between the harm and the failure of a parent to act.[59] Houston shows that such developments in the United States' laws and practice were not welcomed in the feminist scholarship who reacted by changing their stance and de-emphasizing the risks of harm to the child associated with exposure to violence.[60] She highlights that children need specific legal protections against domestic violence as the existing ones of their mothers will not in all cases be sufficient.[61] It should be accepted nevertheless that such specific protection for children from domestic violence may result at times in their protection against their mothers.[62]

It is important to highlight these tensions as children's rights in private custody litigation are often caught in between the more powerful advocacy groups of women and fathers' movement and for this reason they may be easily overlooked.[63] Also, the argument for assessing child maltreatment on the same footing with adult maltreatment has received wider support in the children's rights scholarship.[64]

The discussion is equally complex in the field of children's exposure to domestic violence where, as shown above, feminist advocacy groups are not entirely in agreement with the proposition given that in their view it may result in (over) intervention by child protection authorities. On the other side of the spectrum, fathers' groups have argued that allegations of violence amount to parental alienation which has a damaging effect on the right of

54 Ver Steegh 2004, p.1418.
55 Houston 2017, p. 97.
56 Houston 2017, p. 97.
57 Houston 2017, p. 97.
58 Houston 2017, p. 107.
59 Houston 2017, p. 108.
60 Houston 2017, p. 113.
61 Houston 2017, p. 113.
62 Houston 2017, p. 119.
63 Houston 2017, p. 117 makes the argument that the feminist advocacy in the domestic violence field is higher than that of child advocates.
64 Lansdown 2000; Freeman and Saunders 2014.

the child to maintain contact with both parents.[65] As discussed in this dissertation, the focus of some courts on the parental alienation syndrome has resulted in reversals of custody orders whenever domestic violence allegations made by a parent were not deemed credible (enough) in court.[66]

Weisberg has noted a recent change in approach when it comes to reconciling the rights of children with other competing rights and interests in post separation parenting.[67] Jurisdictions in Colorado and Australia have moved towards a rights-based approach, whereby the child's right to safety is prioritised in post separation parenting disputes.[68] Under this approach, the child's right to safety is understood to be of paramount importance in the best interests assessment.[69] Safety is understood broadly, to encompass emotional, mental and physical well-being of the child; all evidence must be evaluated through the lens of the child's safety.[70] Similarly, Weisberg points to law reforms in Australia whereby the need to protect the child from harm has been prioritised over a continuing relationship with both parents.[71] In other words the right of the child to have contact with both parents prevails only where considerations about child's safety are absent.[72]

The examples of these two jurisdictions are not indicative of a widespread practice in cases of domestic violence and children's rights. However, they show how legislation can be reframed to include a child rights perspective. The feasibility of such an approach shall also be considered in this dissertation, specifically from the perspective of child abduction cases with immigration considerations.

5.3 The relevance of domestic violence for child abduction cases

No direct reference to domestic violence exists in the Child Abduction Convention, nor have the implications thereof been discussed during the *travaux préparatoires*.[73] Internationally, domestic violence was first presented as an issue in 1997 at the third meeting of the Special Commission discussing the operation of the Child Abduction Convention where the participants recognized that "[T]he majority of children... were taken away from their country of habitual residence by their mothers, who not infrequently alleged that they or the children had suffered hardship and domestic violence at the hands of the father."[74] Earlier studies had considered that the abductor was

65 For a discussion on the parental alienation syndrome, See Chapter 3 above, Section 3.6.
66 See Chapter 3 above, Section 3.6.
67 Weisberg 2016.
68 Weisberg 2016, p. 257.
69 Weisberg 2016, p. 257.
70 Weisberg 2016, p. 257.
71 Weisberg 2016, p. 259.
72 Weisberg 2016, p. 260.
73 Weiner 2000.
74 Weiner 2000, p. 596.

the violent parent, and child abduction was yet another means to control the other parent.[75] The abductors were characterised as mentally unstable, revengeful, manipulative; they had abused drugs and were in relationships characterised by domestic violence.[76]

In passing, it was also recognized that abduction could have been motivated by the desire to protect a child and flee from domestic violence.[77] Scholarship focusing specifically on the situation where the abductor was the victim of domestic violence started developing at the beginning of the XXIth century.[78]

These scholars argued that a significant percentage of taking parents were mothers who were taking their children abroad in an escape from domestic violence. For example, Weiner pointed out that seven of nine cases having reached the United States Court of Appeals between July 2000 and January 2001 involved an abductor claiming to be the victim of domestic violence.[79] In an article published in 2005, Shetty and Edelson also found that about one third of published and unpublished cases in the United States included a reference to domestic violence, and 70% of these cases included details on adult domestic violence.[80] The link between domestic violence and mothers as the main demographic responsible for child abduction has been made in academic writings stemming from Europe[81], Australia,[82]New Zealand[83] or Japan.[84]

There are no official statistics about the prevalence of domestic violence in child abduction cases. However, since its first mention in 1997 at the Hague Conference, the topic of domestic violence has been frequently discussed within the Special Commission meetings and recommendations following the meetings, the Judges Newsletters and has been included in the Questionnaires sent by the Hague Conference.[85] In 2011, during the sixth

75 Agopian 1984.
76 Greif/Hegar 1994, p. 284 referring to Janvier et al (1990), Long/Forehand/Zogg (1991).
77 Finkelhor e.a. 1991, p. 806 referring to Agoprian 1984.
78 Kaye 1999; Weiner 2000; Shetty/Edelson 2005.
79 Weiner 2003, p. 765
80 Shetty and Edelson 2005, p. 120.
81 Hale 2017; Trimming/Momoh 2021; Freeman/Taylor 2022.
82 Gray/Kaye 2023.
83 Maxwell 2016.
84 Yamaguchi/Lindhorst 2016.
85 Domestic violence was included on the agenda of the 2000 Special Commission meeting. See Preliminary Document no 1, October 2000, available at < https://assets.hcch.net/docs/eb5e4390-834f-4283-83c3-3032c30c71bb.pdf> , last accessed on 20 May 2023; a recommendation for close cooperation in the case of domestic violence was made in 2001, following the Special Commission meeting of 2000, see Preliminary Document no 5, March 2001, available at https://assets.hcch.net/docs/ebe46c8f-cb62-44b9-b89a-35f63df4d575.pdf; the latest questionnaire is of January 2023 and it includes references to domestic violence and the topic of primary cares (question no. 43 et following), see Preliminary Document no 5 of January 2023, available at https://www.hcch.net/en/publications-and-studies/details4/?pid=8519&dtid=33, last accessed on 20 May 2023.

Special Commission Meeting the Hague Conference expressly considered the link between domestic violence and Article 13(1)(b).[86]

Since the early writings, a wealth of literature and studies has been dedicated to child abduction and domestic violence. Nevertheless, reconciling the original purpose of the Convention with the domestic violence defence, remains one of the biggest challenges to the Child Abduction Convention.

This dissertation does not address at length the difficulties generated by the domestic violence defence as this has been done elsewhere.[87] The following paragraphs discuss how domestic violence interferes with the return mechanism in order to give an overview of some of the main challenges encountered by courts. Section 5.3.1 looks into how domestic violence has been brought before domestic courts as well as into the academic commentaries on this topic. Section 5.3.2 presents the guidance for courts on this topic emerging from two authoritative sources: the HCCH and a European academic network. Finally, Section 5.3.3 briefly outlines how domestic violence has been incorporated into the national laws of Japan, a country which has only recently acceded to the Hague Convention. This example is useful in showing how legislators could reconcile some of the tensions between domestic violence and child abduction.

5.3.1 Domestic approaches and academic commentaries

Domestic violence and child abduction cases typically involve a parent who claims that the reason for fleeing is to protect (her)self and/or the child from the violence of the other parent. This parent is usually the mother and, in addition to allegations of domestic violence, she argues that she is the primary carer of the child. Sometimes it is only the parent who has been directly victimised by the other parent. Other times, the child has also been (psychically) abused, or the child has witnessed the physical and/or emotional abuse by the left-behind parent. The taking parent argues that a return to the country of habitual residence will expose the child to harm for various reasons: the child will be abused, the child will be exposed to violence against the other parent, or the harm will result from the separation as the taking parent will not return to the country of habitual residence (for fear of violence or other reasons). The intensity of violence to which either the child or the taking parent have been exposed to varied from isolated instances to severe violence. Even more, the parent could not always prove with official records that the violence had in fact happened. Sometimes that parent had filed police complaints before leaving, other times no such complaints had been filed. More often than not, there had been no final criminal

86 Hale 2017, p. 10.

87 See among many other authorities Masterton 2016; Weiner 2021; Trimmings e.a. 2022; Jenkins 2022.

decision in the country of habitual residence confirming whether violence had in fact occurred.

As discussed, the Child Abduction Convention offers limited opportunities for refusing the return, most notably under the exceptions mentioned under Article 13(1)(b) and Article 20.[88] Article 13(1)(b) only mentions the grave risk of harm to the child whereas Article 20 has been interpreted to mean that return should be incompatible with the fundamental principles, -laid down in the constitutions- of the returning states. Prohibition of domestic violence is not included *per se* in most of the constitutions of state parties, and therefore Article 20 proved to be of a limited use for the claim of domestic violence.[89] On the other hand there is no reference to the taking parent in Article 13(1)(b) which led to difficulties for judges whenever there was no evidence of the left-behind parent directly abusing the child. Even where such evidence existed, it was sometimes considered that an Article 13(1)(b) defence was not made out if the child had only been sporadically the target of physical violence.[90] Courts have interpreted the 'grave risk of harm' as requiring an elevated form of harm, directly against the child in order to meet the threshold of Article 13(1)(b).[91] The risk 'must be not only real, but a level of seriousness to warrant the qualitative description of harm'.[92] Some courts have not accepted that the domestic violence perpetrated solely against the taking parent was enough to meet the standards of Article 13(1)(b).[93] Under the influence of social studies, some domestic courts changed their approach and found that domestic violence against a parent can be harmful to the child.[94] However, it was considered that only cases of severe (physical) violence could potentially meet the high threshold imposed by Article 13(1)(b).[95]

When courts accepted that domestic violence may become relevant for the purposes of Article 13(1)(b), divergent approaches existed. One imminent question was whether the Child Abduction courts should establish the

88 It should be noted however that domestic violence allegations could also play a role in determining other elements of the Child Abduction Convention such as the habitual residence or whether the left-behind parent had exercised custody rights (See Weiner 2000, pp. 704-706).

89 For a view arguing in favour of Article 20 relevance in domestic violence cases see Weiner 2004.

90 Weiner 2021 and the case law cited therein.

91 See also Chapter 3 of this dissertation.

92 Gray/Kaye 2023 p. 14, referring to the approach in Australia. A similar approach has been taken by courts in other jurisdictions including England and Wales where such an approach originated: Re E (Children (FC), [2011] UKSC 27, para 33, United States (Reece 2022, p. 122), Reen 2022 Canada (p. 159).

93 This has been reported in relation to New Zealand, see Maxwell 2017; Brouwer/Ibili/Nederveen, 2022.

94 US *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000); Lindhorst/Edelson 2012; For UK, Hale 2017; Re E [2011] UKSC 27 [34]; Re S (A Child) (Abduction: Rights of Custody) [2012] UKSC 10 [6].

95 This appears to have been the case in Australia, see Gray/Kaye 2023, p. 15.

truthfulness of the domestic violence allegations.[96] This impacted heavily on the duration of return proceedings as judges had to administer evidence and follow various procedural rules which usually lengthened considerably the proceedings.[97] Other countries considered that it would be inconsistent with the Hague Convention to examine the veracity of the allegations and instead focused on whether the country of habitual residence was able to protect the child from a grave risk upon return.[98] Even within this latter approach, a dilemma emerged. When looking at the capacity of a system to protect the child upon return, should judges look at the system as a whole or should the focus be on concrete measures of protections for the child? Sometimes courts ordered the return without an analysis of the domestic violence allegations, on the ground that the country of habitual residence has institutions and regulations which can offer the taking parent and/or the child adequate protection.[99] On other occasions, courts went further and looked for the existence of measures of protection in the state of habitual residence. Measures of protection are to be understood broadly; they encompass undertakings or promises of the left-behind parent to behave in a certain way, the deposit of a sum of money, etc. In turn, protective measures could on the one hand directly secure protection against the grave risk of harm or they could be aimed at ensuring a 'soft landing' for the taking parent.

Whenever the focus was on the system's capacity to protect (either in the form of general statements or concrete protective measures), the emphasis was on the duty of trust in the foreign legal systems.[100]

Overall, two main approaches to the assessment of domestic violence have been identified: the assessment of allegations approach and the protective measures approach.[101]

Under the *assessment of allegations approach*, courts first consider summarily if the allegations of the domestic parent have merit. In the affirmative, courts then examine whether return poses a grave risk to the child and finally, as a last step, if there are available protective measures.[102] Courts following the *protective measures approach* have dispensed with the fact finding task of assessing the veracity of the allegations and have instead focused on whether the child can be adequately protected in the state of habitual residence.[103] For both approaches, courts could either opt for looking at whether the system in general is capable of protecting the child or whether

96 Hale 2017, p. 12.
97 Hale 2017, p. 12.
98 Weiner 2021, Hale 2017.
99 Weiner 2021, Hale 2017, Trimmings/Momoh 2021, p. 7.
100 In this sense see also Section 4.5.1 above concerning comity and child abduction.
101 Freeman/Taylor 2022; Trimmings/Momoh 2021.
102 Trimmings/Momoh 2021, p. 7.
103 Trimmings/Momoh 2021, p. 6; this approach has also been followed in Australia Gray/Kaye 2023, New Zealand Maxwell 2017.

concrete measures of protection should be in place and if these measures are effective.

Most recently, scholarship supported the assessment of allegations approach as the most suitable for domestic violence cases.[104] The reasons for this position, as well as the guidance of the Hague Conference are discussed more into detail in the following section.

5.3.2 The HCCH Guide to Good Practice and the POAM project

The Guide to Good Practice expressly mentions domestic violence as potentially triggering a grave risk of harm under Article 13(1)(b) of the Hague Convention. This Guide, although not binding, represents a recent authoritative interpretation of Article 13(1)(b). Paragraph 39 of the Guide clarifies that the steps of assessment of the grave risk of harm are the same, regardless of the subject matter of the risk. In paragraphs 40-42 the Guide proposes the *assessment of allegations approach.*

The first step is thus the summary determination of the merits of the domestic violence allegation. The Guide recommends here that courts look at the nature, frequency, and intensity of the violence.[105] However, in order to avoid protracted proceedings, the Guide discourages courts from seeking evidence abroad.[106] It is for the taking parent to prove the defence. Also, evidence of domestic violence alone is not sufficient for establishing a grave risk of harm.[107] At the same time, it is accepted that harm to the parent may, in exceptional situations, amount to a grave risk of harm to the child.[108] The Guide proposes that courts focus on the effects of the violence on the child upon return, and whether the effects meet the threshold of a grave risk of harm. Then, assuming that a grave risk of harm has been established, courts are encouraged to evaluate whether effective and adequate protection measures exist in the state of habitual residence. The Guide to Good Practice indicates as suitable protection measures the existence of legal protection in the state of return.[109] As to form, the Guide to Good Practice actively discourages the use of undertakings given the lack of enforceability.[110] Instead, mirror orders, or protective measures adopted pursuant to the 1996 Convention are considered acceptable.[111] On the types of protective measures, the Guide gives some examples such as access to legal services, financial assistance, housing assistance, health services or shelters.[112]

104 Trimmings/Momoh 2021; Gray and Kaye 2023; Freeman/Taylor 2022.
105 Guide to Good Practice Article 13(1)(b), para 58.
106 Guide to Good Practice Article 13(1)(b), para 53.
107 Guide to Good Practice Article 13(1)(b), para 58.
108 Guide to Good Practice Article 13(1)(b), para 33.
109 Guide to Good Practice Article 13(1)(b), para 59.
110 Guide to Good Practice Article 13(1)(b), para 47.
111 Guide to Good Practice Article 13(1)(b), paras 47-48.
112 Guide to Good Practice Article 13(1)(b), para 43.

In any event, protective measures should not exceed what is strictly necessary and they can only be in place for the shortest period of time to address the grave risk of harm.[113] Protection measures are different from practical arrangements or soft-landing measures, such as purchasing plane tickets or financial support -usually from the left-behind parent to the child and taking parent- upon return.[114]

Domestic violence has also been analysed in one recent European project: The Protection of Abducting Mothers in Return Proceedings (the "POAM") which has equally proposed a Best Practice Guide (the "POAM Guide") specifically designed to domestic courts within the European Union.[115]The POAM Guide aligns generally to the HCCH Guide to Good Practice; however, the former is exclusively targeting domestic violence and for this reason it is more detailed, and arguably it provides enhanced guarantees in certain respects. The POAM Guide equally endorses the *assessment of allegations approach.* This Guide however is more explicit in recognising that a grave risk of harm to the mother can trigger the application of Article 13(1)(b).[116] Domestic violence perpetrated on the mother alone shall impact the child as either it will impair her parenting capabilities or it will result in a separation of the child from the mother.[117]

Equally, the POAM guide recognizes more explicitly psychological violence as domestic violence.[118] The definition of grave risk of harm is that the risk must be real, of a level of seriousness to amount to grave and it should not be one that the child is expected to tolerate.[119] Similarly to the HCCH counterpart, the POAM guide clarifies that the nature, frequency and intensity of the violence are all relevant factors to take into account.[120] Harm is broadly divided into three categories – minor, middle and grave and most of the cases will fall within the second category.[121] The POAM guide subsequently analyses various pathways for protection orders which are applicable within the European Union. For child abduction cases outside of the European Union Trimmings and Momoh -who formed part of the research team of the POAM project-recommended cautiousness for courts when accepting undertakings in light of their general demonstrated inefficacy.[122]

113 Guide to Good Practice Article 13(1)(b), para 44.
114 Guide to Good Practice Article 13(1)(b), para, see also Trimmings/Momoh 2021, p. 12.
115 The website of the Project is: <https://research.abdn.ac.uk/poam/>, last accessed on 22 May 2023.
116 Trimmings e.a. 2022, p. 263.
117 Trimmings e.a. 2022; this was also the approach proposed by Hale 2017, p. 15.
118 Trimmings e.a. 2022, p. 262-264.
119 Trimmings e.a. 2022, p. 262.
120 Trimmings e.a. 2022, p. 264.
121 Trimmings e.a. 2022, p. 263.
122 Trimmings/Momoh 2021, p. 18.

The POAM Guide and the HCCH Guide to Good Practice have been presented above as they reflect the most recent authoritative works on child abduction and domestic violence.

5.3.3 National legislation implementing the Hague Convention

In addition to being raised to oppose return during court proceedings, domestic violence may also be included as an exception to return upon a state's accession to the Convention under Article 38 HC. Japan's accession to the Hague Convention in 2014 offers an example of expressly providing for domestic violence within Hague Convention Proceedings. Japan's act of implementation adds that when considering Article 13(b) courts are to examine, *inter alia*:

> "(ii) Whether or not there is a risk that the respondent would be subject to violence, etc. by the petitioner in such a manner as to cause psychological harm to the child if the respondent and the child entered into the state of habitual residence;
> (iii) Whether or not there are circumstances that make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence."[123]

Scholars have considered this provision to be the "most lenient standard for Article 13(b) proceedings in the world."[124]

5.4 Separation of the child from the primary carer

5.4.1 The change in the profile of the abductor

The language of the Hague Convention is gender neutral: the person who has removed the child in breach of custody rights is guilty of child abduction.[125] In the Explanatory Memorandum to the Convention, Pérez Vera commented that the abductor is usually somebody from the child's circle of trust who is motivated by the desire to obtain a favourable custody order in the country of habitual residence. Despite the Convention's neutral language, many of the writings covering the *travaux préparatoires* have highlighted that the drafters originally envisaged fathers as the 'typical' abductors.[126] At the time the Convention was being negotiated, most

123 Weiner 2021, p. 245.
124 Stark 2015, p. 798.
125 Adair Dyer credits the Convention's success in time to its gender-neutral language. See Dyer, 2000, p. 3.
126 Cass 2020; Dyer, 'Report on International Abduction by One Parent ("Legal Kidnapping")' Preliminary Document 1 (1978), Actes et Documents of the XIVth Session, 17; Schuz 2021, p. 20. See also Section 4.2. of this dissertation.

countries drew a sharp distinction between custody and access rights and in practice women were usually granted custody and men access rights.[127] Against this background, the drafters considered that fathers would snatch their children away from their place of habitual residence in an attempt to secure a more favourable decision elsewhere.

Further, the Convention protects both access and custody rights and it clearly distinguishes between the two notions. Under Article 5 (a), 'custody rights' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence whereas "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence. Further, Article 7 covers the procedure for securing the effective exercise of access rights.

In time both the original assumption about the profile of the abductor as well as the distinction custody/ access rights have substantially changed.

All statistical analyses to the Convention have consistently indicated that most of the taking parents are mothers.[128] The percentage of taking mothers was 69 in 1999, 68 in 2003 and 2008, and 73 in 2015.[129] The latest study published in 2023 and covering child abduction applications filed in 2021 identified that during this year, the percentage of taking mothers rose to 75.[130]

This shift can be attributed to a change in the meaning of custody under national laws as well as the interpretation of this term under the Hague Convention. First, in most of the States Parties to the Convention and certainly in those countries with the highest incoming and outgoing abduction cases, 'custody' has largely been replaced by 'parental responsibilities.'[131] Parental responsibilities are usually exercised jointly by the parents from the birth of the child and include a wide range of rights for the parents.

---

127 For a discussion, see Section 4.2 of this dissertation.

128 <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=24>, last accessed on 6 October 2023.

129 Prel. Doc. No 11 A of September 2017 – Part I — A statistical analysis of applications made in 2015 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* — Global Report.

130 Lowe/Stevens, Global Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention, Preliminary document 19A, October 2023, para 14.

131 For Europe, see Boele-Woelki e.a. 2007, <<http://ceflonline.net/parental-responsibility-reports-by-jurisdiction/>>, last accessed on 1 November 2020; Canada: Bala 2014; United States: Kline Pruett, Marsha, and J. Herbie DiFonzo 2014 discuss the changes in terminology. In the United States they mention that parental responsibilities after divorce is divided into decision-making and parenting time (p. 154); Bozzomo 2002. In the United States laws regulating the relationship between children and parents after parental separation are state laws, meaning that there are 50 different family statutes. In some states the functional equivalent of 'parental responsibility' is that of 'joint legal custody'. Australia: Section 61 B of the Family Law Act.

Most importantly, for the purposes of the Child Abduction Convention, 'parental responsibilities' include the right to veto the relocation of the child to another country.

At the same time, since 2010 when the US Supreme Court delivered its judgement in *Abott v. Abott*, the right to veto the child's relocation gradually became the single most important factor in deciding whether a person has custody for the purposes of the Child Abduction Convention.[132] In other words, regardless of actual living arrangements or whether a parent is factually involved in a child's upbringing, both parents will usually have custody over the child and be entitled to request the return under the Convention. This in turn has resulted in a de-emphasis of the Convention's provisions on access rights. In 2021 for example, Lowe and Stevens found that of a total of 2,180 applications only 399 concerned access rights[133]. The Convention and indeed the case law continue to use the word 'custody' but as Lady Hale has observed many of the return applications are brought with a view to restore contact with the left-behind parent rather than a child living with a primary carer.[134]

Therefore, the notion of 'primary carer' has been introduced to reflect the living arrangements of the child prior to abduction and to designate the parent who was responsible for the day-to-day care of the child prior to the abduction. In national legislations terminologies differ, from shared care, shared physical custody or the 'residential parent.'[135] In the Statistical analysis of 2015, Lowe and Stevens found that where the information was available, 80% of the taking parents were the 'primary carers' or 'joint primary carers'. Where the taking parent was the mother, they were the primary carers in 91% of the cases as opposed to fathers who were the primary carers in 61% of cases.[136] The latest statistical data of 2021 noted an increase in joint primary carers: 73% of the taking parents were joint primary carers of their children.[137] 15% were sole primary carers.[138]

The Convention applies in the same way regardless of whether the taking parent was the primary carer of the child before the abduction. Questions have arisen however as to the circumstances in which the separation of the child from the primary carer may amount to a grave risk of harm or intolerable situation to the child.

132 Abbott v. Abbott, 130 S. Ct. 1983 (2010).
133 Lowe/Stevens, Global Report 2023, para 22.
134 Hale 2017, p. 6.
135 Boele-Woelki e.a. 2007; Canada: Bala 2014; United States: Pruett, et al. 2014.
136 Lowe/Stevens, Statistical analysis 2017, para 3.
137 Global Report 2023, para 44.
138 Lowe/Stevens Global Report 2023, para 44.

5.4.2 Primary carer abductions: existing approaches and recommendations

It is now accepted that the sociological paradigm has changed in that primary carer parents, particularly women, are responsible for child abduction.[139] However, there is hardly any study, empirical or otherwise, analysing the implications of this change for the rights of children. It is also unclear how courts should approach such situations. The primary carer status has been analysed mainly in relation to allegations of domestic violence.[140] However, less attention has been dedicated to the separation of the child from the primary carer in other contexts such as criminal prosecution, immigration, state of health or for other reasons.

In practice the primary carer parents have submitted that they cannot or will not return to the country of habitual residence and the child will be exposed to a grave risk of harm due to this separation. The issue is also identified in the Hague Conference's Guide to Good Practice among one of the six most common defences to return.[141] This Guide indicates that domestic courts have rarely refused to return children on the basis of this argument.[142] The Guide further proposes that the focus is on the effects of the separation on the child rather than on the reasons for the parent, even though it is admitted that the parent's reasons may sometimes form part of the assessment.[143] In line with its approach to other defences to return, the Guide to Good Practice recommends that domestic courts apply a high threshold before considering the application of this exception, and that even where the threshold is met, return should nevertheless be ordered where protective measures in the state of habitual residence may alleviate the concerns of the parent.[144]

In a comparative study of 16 cases delivered by courts in Switzerland, France and Belgium, Van Hof and Kruger found that when considering the issue of the separation of the child from their taking parent, the courts set a high threshold before finding that a particular situation amounted to a grave risk of harm.[145] In their research which collected a total of 25 cases, the domestic courts had accepted that the grave risk of harm exception was met due to the separation of the child from the primary carer in 5 cases. Overall, the courts only considered that the threshold was met when the parent was in an objective impossibility to return and the left-

139 ECtHR 26 November 2013, no. 27853/09, *X v. Latvia.* concurring opinion of Judge Pinto de Albuquerque; See also Lowe/Stevens, Global Report 2023, paras 44-47; as of 2015 they also note an increase in the joint primary carer fathers who are responsible for child abduction.

140 Hale 2017.

141 Guide to Good Practice Article 13(1)(b), paras. 37-48.

142 Guide to Good Practice Article 13(1)(b), para 63.

143 Guide to Good Practice Article 13(1)(b), para 64.

144 Guide to Good Practice Article 13(1)(b), para 65.

145 Van Hof/Kruger 2018.

behind parent was not capable of caring for the child.[146] In practice courts have been highly reluctant in finding that a parent had demonstrated an objective impossibility to return. For example, no objective impossibility existed where the taking parent was pregnant and unable to move in the short term, lacked employment, was subject to domestic violence, risked imprisonment or could not live in the country of habitual residence due to the lack of immigration permission.[147] Further, it is not clear to what extent the courts have analysed the relationship between the child and the taking parent and if the parent child separation would expose the child to harm. In Switzerland however, it has been found that infants under the age of 2 could be exposed to harm if separated from their primary carers.[148]

The same approach is followed in Canada, where separation in and of itself has not been found to amount to a grave risk of harm.[149] The standard of the Canadian Supreme Court is similar to the one recommended by the HCCH and followed by the three domestic jurisdictions mentioned above. Canadian courts assess whether the parent has put forth reasonable grounds for not returning, and if so, whether protective measures are in place or the children can reside with the left-behind parent.

In practice, the application of this standard appears to result in an almost insurmountable burden for the taking parent. For example, in the case decided by the Canadian Supreme Court, the taking parent had demonstrated that she had a precarious residence status and that the laws in the country of habitual residence (United Arab Emirates) permitted a husband to physically punish women, that a woman would lose custody if remarried, and that she needed to obtain permission from her husband for accepting an offer of employment.[150] Nevertheless, the Canadian Supreme Court accepted, without further investigation, the father's undertaking to provide the mother with accommodation in the country of habitual residence, and his guarantees that children would be allowed to live with their mother despite existing custody orders to the contrary.[151]

To sum up, it does not follow from the existing research or from the judgement of the Canadian Supreme Court that any cooperation or discussions were undertaken between the relevant authorities in the states concerned to ensure that the children would be *effectively* protected against the identified risks upon return. In the judgement of the Canadian Supreme Court, it is accepted that "the objective of discouraging abduction must yield to the

146 Van Hof/Kruger 2018, pp. 149-150.
147 Van Hof/Kruger 2018, referring to Court of Appeal Agen (France) 1 December 2011, no. 11/01437; Federal Tribunal (Switzerland) 31 August 2010, no 5A 520/2010; Federal Tribunal (Switzerland) 3 September 2014, no 5A_584/2014; Court of Appeal of Poitiers (France) 6 May 2009, no. 09/00305.
148 Van Hof/Kruger 2018, p. 146.
149 F.v.N., 2022 SCC 51, 2 December 2022.
150 F.v.N., 2022 SCC 51, 2 December 2022, para 167.
151 F.v.N., 2022 SCC 51, 2 December 2022, para 13.

paramount objective of preventing serious harm to children."[152] Nevertheless, while the legal standard -objective impossibility to return- seems to be accepted its practical application was disputed between judges. It consequently appears that in practice the objectives of the Hague Convention for cross border cooperation weigh heavier than the rights of individual children to be protected from harm, especially since -as in the case at hand- objective allegations of risk are discounted on the basis of private undertakings, without any hard evidence as to the actual circumstances of the children upon their return.

Last but not least, it should be noted that, from the perspective of the rights of children and as discussed in the preceding section, the CRC Committee endorses an expansive definition of violence against children to include both psychological and physical violence.[153] The Committee does not distinguish between the two in terms of the legal protection children deserve.[154] In other words, to the extent that the risk of violence exists, it is irrelevant if that the source of the risk is psychological violence. Consequently, the separation of a child from the primary carer may amount to violence against children.

The appropriate balance between the rights of children and other comity considerations of the Child Abduction Convention shall be revisited in the Preliminary Conclusions (Chapter VI) as well as in the dedicated sections to the approach of the European Court of Human Rights (Section 8.4) and the Court of Justice of the European Union (Section 7.5).

5.5 Power imbalances; domestic violence and immigration law – substantive considerations

From a legal perspective, immigration and family law are two distinct areas of law, operating independently and following different principles.

Family law is regarded as the discipline establishing the legal rights and duties between family members, including the husband and wife, parents living with children and siblings or others related by blood or marriage.[155] Family law is concerned with statuses of individuals and stipulates when law may intervene to protect family members.[156] Traditionally, the regulation of marriages was at the core of national family law. In view of the evolution of the concept of family, modern family law is perceived to have

152 F.v.N., 2022 SCC 51, 2 December 2022, para 140.
153 CRC Committee, General Comment no 13, para 14.
154 CRC Committee, General Comment no 13.
155 di Torrella/Masselot 2004, p. 33.
156 Probert 2003, p. 3.

a more remedial function of, for example, protecting children who are perceived as the weaker parties in cases of marital breakdown.[157]

Substantive family law is still essentially national law. It is generally considered that family law systems are the product of religious and cultural factors, thus little harmonisation from supranational institutions is possible in this field.[158] Yet, national family laws in the Global North[159] converge on several core principles such as permission to divorce and that the best interests of children shall guide the post separation decision-making.[160] Family dis-unity is accepted and divorce is seen as transforming the relationships, rather than ending them.[161] In sociology, a shift has been noted where divorce is viewed as "a transition between the original family unit and the reorganisation of the family which remains a unit, but a bipolar one". [162] Divorce thus became a way of redefining relationships over a long period of time rather than ending them.[163] The best interests standard was reconceptualised to include a 'right' to contact with both parents after separation, leading to arguments either for joint custody arrangements or some alternatives to the concept of custody itself.[164] Post-separation parenting agreements retain the principle that parents shall exercise their responsibility over children jointly.[165] Custody, in the sense that one parent has rights and duties over a child, has virtually disappeared and the principle operating in Global North jurisdictions is that parents retain joint parental responsibilities over the child after divorce or separation.[166] Courts decide on the allocation of responsibilities between former partners; however both parents usually retain the right to veto a relocation – the essential component of custody for the purpose of the Child Abduction, regardless of

157 di Torrella/Masselot 2004, p. 33.

158 Parkinson 2016, p. 38; Silberman/Wolfe 2003, p. 247 also note that some exceptions exist in the case of Europe for Council of Europe and European Union Member States. These exceptions shall be discussed into more detail in Part 2 of this dissertation.

159 'Global North' includes the United States, Canada, England, nations of the European Union, as well as Singapore, Japan, South Korea, and even some countries in the southern hemisphere: Australia, and New Zealand. It is here acknowledged that the use of the term has been considered problematic see: Blicharska e.a. 2021. Notwithstanding these discussions the term is used as the countries of the 'Global North' after the same as countries with the highest number of outgoing and incoming abduction applications under the Hague Convention.

160 Van Krieken 2015, p. p.26; Parkinson 2016, p. 39.; Antognini 2014, p. 10, Sormunen 202, Mair/Orucu 2010, Pousson 2010.

161 Antognini 2014, p. 12.

162 Thèry 1986, p. 356.

163 Schepard 1999, p.396. van Krieken 2005, Antognini 2014, Thèry 1986.

164 van Krieken 2005, p. 34.

165 Lowe 2005; Parkinson 2008; Boele-Woelki 2004, CEFL principle 3.1. (c) Principles 3.10; 3.11; 3.12; 3.14.

166 van Krieken 2005; see also the literature cited above, Lowe 2005; Parkinson, 2008; Boele-Woelki 2004.

how much time the child spends with each of the parents.[167] In cross border cases, a primary caretaker is understood to mean the parent who spends most physical time with the child, the parent with whom the child lives the majority of time.[168]

Immigration law, on the other hand, is concerned primarily with regulations regarding the admission, naturalisation and citizenship policies within a country.[169] It is considered a matter of well-established international law that states have the exclusive prerogative to control the aliens' entry and residence in their territories.[170] Hence, there is no international instrument that guarantees such a right.[171] Immigration law typically recognises unified families, marriage migration continuing to play an important role in receiving immigration permission to live in a given country.[172] In many jurisdictions residence rights are granted via sponsorships, the dissolution of the marriage entailing the loss of the right to reside for the immigrant spouse.[173] Immigration law does not usually recognize the continuation of the right to reside post-separation. As opposed to family law where joint parenting laws have been justified by the right of the child to have contact with both parents; -with some exceptions – the same right of the child is

167 For example in Israel: Kritzman-Amir 2015, p. 263 "In general, an arrangement that allows the child to maintain a real and ongoing relationship with both his parents will be given preference"; see also van Krieken 2005; Lowe 2005; Parkinson, 2008; Boele-Woelki 2004; Picontó Novales 2012; Cottier e.a. 2017, p. 88.

168 See Section 5.4.

169 Lee 1999, p. 86.

170 This principle was first laid down in the *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, ECtHR 28 May 1985, Appl. nos. 9214/80 9473/81 9474/81, ECLI:CE:ECHR:1985:0528JUD000921480, para 67, and reiterated thereafter in virtually all cases concerning immigration questions.

171 For eg *Boultif v. Switzeland*, ECtHR 2 August 2001, appl. no. 54273/00, ECLI:CE:ECHR:2001:0802JUD005427300, para 39.

172 Antognini 2014, p. 21; Ricordeau 2012.

173 Antognini 2014, pp 43-46, See also Stoyanova 2018; see also Council of Europe, Committee on Migration, Refugees and Population, Report 'Protecting migrant women in the labour market', Doc. 12549 24 March 2011 (available at: <<https://pace.coe.int/pdf/a9e2db21d2fba624236aba7ee3336ee79e327fac69dc4f04944b31777807638d/doc.%2012549.pdf)>> para 29 explaining that "In most European Union member states, a woman who enters with a family reunification or "spouse" visa has to wait many years to be able to acquire a status autonomous and independent of her spouse. If she is a victim of domestic violence during this period or if she files for divorce, she is not entitled to a residence permit, nor does she have access to shelters. Leaving an abusive relationship would therefore mean becoming undocumented with very limited rights and being at risk of deportation. This dissuades many women who have suffered violence from making an official complaint. Linguistic barriers, family pressure, isolation and cultural traditions are additional problems which may prevent victims from making formal complaints." See also: Australia: Segrave 2018, pp. 128-129; Switzerland: Chen 2022; Menjívar, and Salcido 2002; England and Sweden, Voolma 2018; US: Antognini 2014, pp 43-46, for France (where the parent child relationship is taken into account in deportation decisions) see Langrognet 2018.

not considered relevant whenever one of the parents faces expulsion.[174] For Eekelaar as well, expulsion decisions are decisions about a parent, the child being only indirectly affected by such measures.[175] Migration scholarship has highlighted the limited engagement of immigration authorities with the best interests of the child in decision-making.[176] Even when some consideration is given to the best interests of the child, this generally benefits unaccompanied minors, and rarely children of separated parents.[177] As opposed to spouses who can sponsor a partner for migration purposes, migration law does not generally recognize the rights of children to derive residence rights onto their parents.[178] Where it has done so, children have been qualified as 'anchor children' and critics have emphasised the possibilities of parents to abuse immigration laws through their children.[179]

Even if there is no formal link between family and immigration laws, their different evolution and principles expose mixed-status families[180] to difficult conundrums. On the one hand, post separation parenting rules favouring joint parental responsibility require family members to live within close geographical proximity. On the other hand, immigration laws expose parents to deportation in the aftermath of the relationship breakdown. These tensions have been exposed in migration case law and literature focusing on the assessment of (separated) parents' right to reside in the same country as their children.[181] Migration law investigates whether a parent can claim legal residence rights on the basis of the relationship with the child. In this hypothesis, parents were subject to expulsion decisions, or their right to reside was otherwise being questioned before domestic courts. Generally, in jurisdictions where a parent cannot derive residence rights from the child,

174 For example in the US: Thronson 2005; Carr 2009; for Israel Kritzman-Amir 2015; Eekelaar 2015, pp. 19-21; within the European Union the situation is somewhat different due to the intervention of the ECtHR and the CJEU. However, arguments to the effect that parent child ties are irrelevant in the decision to deport a parent were put forth by several governments in their observations submitted in the CJEU Chavez-Vilchez case: see discussion and further references in Chapter 10, Section 10.2.1 below.

175 Eekelaar 2015, pp. 19-21.

176 Sloth-Nielsen/Collinson/Spalding 2023, discussing approaches in South Africa, United Kingdom and the ECtHR; Sullivan 2014 discussing the approach in the United States.

177 Bhabha 2014, pp. 61-95; Wolf 1996; Zug 2011.

178 For example, Kritzman-Amir 2015, p. 273, Sloth-Nielsen/Collinson/Spalding 2023, p. 4. In relation to Australia Segrave 2018, p. 134 writes: "Parents of Australian citizen children who are not citizens are not automatically eligible for Australian permanent residency or any other pathway towards citizenship. The extent to which this happens across Australia is unknown, and extremely difficult to quantify."
For a discussion on the EU supranational courts, see Chapter 10 of this dissertation

179 Martuscelli 2023.

180 'Mixed status families' are understood here to mean families where at least one family member is not a citizen or permanent resident of the host state.

181 For discussion concerning the European context see Chapter 10 of this dissertation. For other jurisdictions: the United States: Thronson 2005; Carr 2009; Israel: Kritzman-Amir 2015; South Africa: Sloth-Nielsen, Collinson and Spalding 2023.

the right to stay of such a parent on the basis of the relationship with the child is either non-existent, or subject to proving that leaving will expose the child and the parent to extreme hardship – a very stringent test.[182]

The same tensions have been presented to family courts in the context of decisions on custody and parental responsibilities. The question for family courts was related to the weight to attach to the immigration status of a parent. The responses have varied; sometimes family courts used the immigration status of one parent as a reason for depriving such parent of custody.[183] In other words, the lack of immigration permission to remain of one parent was the key factor for the courts' finding that it was in the best interest of the child to vest parental responsibility solely with the other parent.[184]

On other occasions, parents retained joint parental responsibilities, however, the parent with precarious immigration rights remained subject to expulsion as joint parental responsibilities for immigration law did not amount to an extraordinary circumstance allowing that parent to remain.[185] On yet other occasions, family courts changed the allocation of parental responsibilities following expulsion so as to reflect the fact that the parent was no longer in the country.[186] It has also been proposed that even when immigration status will not be taken into account in the final parenting order, such status "will serve the dangerous function of acting as a repository for the unconscious biases and punitive impulses of judges against immigrant parents."[187]

Overall, the different evolution of family and migration laws have exposed parents and children from mixed-status families to different push and pull factors and to navigating systems pointing to opposite directions: policy considerations call for keeping families within close geographical proximity in family law and policy considerations of restricting access to resources for nonnationals result in restricting immigration benefits to various categories of migrants.

In addition, another body of literature has examined how immigration laws create asymmetrical power relations between spouses and enable coercive controlling behaviours. The assessment has focused on the intersection between immigration law and domestic violence. Structural intersectionality, as part of the broader production of inequality, has offered a framework for examining how immigration laws compound the exposure to domestic

182 United States: 23 I&N Dec. 56 (BIA 2001); *Matter of Andazola-Rivas,* 23 I&N Dec. 319 (hardship clause), Mohsin 2023.

183 Such cases have been reported especially in the United States: see McFarland and Spangler 2008; Thronson 2007. Kritzman-Amir 2015 discusses these cases in Israel. The case law of the CJEU and the ECtHR outlined in Chapter 10 also identifies similar practices in European countries.

184 Ibidem.

185 Kritzman-Amir, 2015, pp. 279-280.

186 Thronson 2007, p. 463.

187 Abrams 2006, p. 88.

violence of migrant women who lack citizenship or permanent residence status.[188]

The argument was not that state agents are committing domestic violence but rather that migration laws enable perpetrators to threaten their victims with deportation, removal of children, economic precarity, or isolation.[189] The enabling factors have been precisely the legal regimes placing temporary migrants in a position of dependency on their partner. Such dependency is derived from legal residence rules which dictate that living in a particular country is conditioned on being sponsored for a certain period of time.[190] It follows that the dissolution of the relationship results in the loss of residence rights. Some jurisdictions have enacted specific legislative provisions allowing victims/survivors of domestic violence to retain independent immigration status even after the dissolution of the marriage.[191] It has been argued that despite these legislative caveats for survivors of domestic violence, policies discouraging immigration have rendered domestic violence waivers to legal residency rules difficult and sometimes impossible to access.[192] They usually do not cater for many of the individual scenarios that victims/survivors may find themselves in and this results in pushing domestic violence victims/survivors into remaining in abusive relationships.[193] In some cases, they cannot be accessed because threats with deportation are not included among forms of domestic violence.[194]

In addition, even when domestic violence waivers exist in theory, other laws and regulations leave temporary migrants in an impossibility to access

188 The structural intersectionality lens was based upon the writings of Crenshaw 1990. The link between immigration status and domestic violence has been developed among others by, Segrave 2017; Chen 2022; Menjívar, and Salcido 2002.

189 Segrave 2021, p. 35.

190 Australia: Segrave 2018, pp. 128-129; Switzerland: Chen 2022; Menjívar/and Salcido 2002; UK: Anitha 2011; US: Erez e.a. 2009, 2017; UK and Sweden Voolma 2018.

191 This is the case of The United States (<https://www.americanimmigrationcouncil.org/sites/default/files/research/violence_against_women_act_provides_protections_for_noncitizen_women_and_victims_of_crime.pdf>), Canada (<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/permits/family-violence.html>) ; Australia (<https://immi.homeaffairs.gov.au/visas/domestic-family-violence-and-your-visa>), and several EU countries. For an overview see also OECD 2024 report: <https://www.oecd.org/migration/mig/How-do-OECD-countries-respond-to-domestic-violence-against-migrants-Migration-Policy-Debates-No-34-January-2024.pdf>.

192 For example Stoyanova 2018 discusses how Article 59 of the Istanbul Convention which provides some immigration relief for domestic violence victims at the same time exclude, among others, victims (i) whose residence permit was not derived from their spouse; (ii) who were in an irregular or undocumented status at the time of application for the domestic violence waiver; (iii) whose abuse lost the residence rights prior to the victim/survivour application for the domestic violence waiver; (iv) who were not living with the abuser at the time of application. See also Olivares 2011 (discussing the legislation in the United States); Vasil 2023 (discussing experiences of immigrant women in Australia); see also Jelinic 2019; for Canada: Mosher 2023.

193 Segrave 2018, p. 131; Stoyanova 2018, p. 82; Villanueva Sainz-Pardo 2014, p. 686.

194 Segrave 2018, p. 135.

public funds such as housing or economic support while waiting for the decision on residence status.[195] Neither do they have the right to work during this time.[196]

In sum, migration law places the responsibility on the victim to leave the country or negotiate a complex administrative process that may or may not result in a path to citizenship.[197] Importantly, given the role of the state in the aforementioned dynamics, it has been argued that the focus should shift from perpetrators and individuals alone to identifying how the migration regime contributes to domestic violence.[198] In this view, an additional form of coercive control is exerted via the administrative legal, and regulatory regime.[199] The harm is produced by the migration laws and regulations which empower perpetrators to leverage the victim's migration status within the context of domestic family violence.[200]

5.6 Child abduction and immigration considerations

Interestingly, even though child abduction has consistently been flagged as a problem generated by globalisation and increased movement of people, child abduction scholarship has paid limited attention to the intersection between this phenomenon and immigration.[201] Immigration has mostly been analysed in the context of the settlement exception, where the question was if the precarious immigration status of the child and/or the parent could be seen as an obstacle in finding that the child has settled in their environment for the purposes of Article 12 of the Convention.[202] These cases are outside the scope of research as there is no immigration obstacle for the parent and child to return to the state of habitual residence. On the contrary immigration law may not allow them to remain in the country of refuge.

Immigration however, in the sense described in Section 5.5 above – as a factor potentially leading to the parent child separation- has been brought as an exception to return in the Child Abduction Convention. The following sections are primarily descriptive, they focus on identifying how child abduction courts have dealt with immigration considerations. First, Section

195 Anitha p. 1263.
196 Anitha p. 1280.
197 Segrave 2018, p. 131.
198 Segrave 2021, p. 26.
199 Segrave 2018, p. 131; immigration as a form of coercive control has also been accepted in Canadian legal practive: see Mosher 2023, p. 324.
200 Segrave 2021, p. 27; Jelinic 2019, p. 262.
201 A few contributions mention the issue of immigration see for example Martin 2014, p. 336; there are also several scholarly publications concerning the relationship between child abduction and asylum: see Walsh/Atkins 2022; Garbolino 2019; Loo 2016; Norris 2010.
202 Mendoza v. Mendoza, No. 08-55067, 18 March 2009 (United States Court of Appeal for the Ninth Circuit); Re C (A Child), [2006] EWHC 1229 (Fam) (United Kingdom High Court of Justice, Family Division). In this sense see also Cass 2020, Erler 2018, Schuz 2008.

5.6.1 outlines the methodology used for identifying the cases as well as the types of cases that have been selected for analysis. Then Sections 5.6.2 and 5.6.3 discuss domestic case law and practice in relation to the two main types of immigration considerations which came to the fore following the selection process described in Section 5.6.1, namely the lack of the relevant immigration permissions to enter, reside or work in the country of habitual residence and second, the application for asylum in the country of presence.

5.6.1 Identification of cases and prevalence of the issue

The cases analysed herein have been primarily selected from the Hague Conference's child abduction case law database.[203] An initial overview for the search terms "visa" and "grave risk Art 13 (1) (b)" yielded 147 judgments. A search for the word 'asylum' yielded 56 results. The scope of research was subsequently narrowed down to those cases where immigration considerations represent an obstacle to return for the taking parent. Within these considerations the question of the separation between the child and the parent becomes central.[204] For example the question of immigration status is also discussed in the context of the settlement exception. However, here it is usually the left-behind parent who objects to settlement and one of the arguments is that neither the taking parent and (usually) nor the child hold a valid residence permit in the country of abduction nor have they applied for asylum protection. In such cases there is no immigration based obstacle to return which would result in the parent child separation. For this reason, such cases have not been deemed relevant for this research.

Of the cases reviewed, a total of 43 judgments concerned the issue of the parent's immigration status as an obstacle to return. The relevant judgments originate from the United States, the United Kingdom, Switzerland, Japan, France, South Africa, Canada or Israel. They have been read in full whenever the original language was English or French; otherwise the analysis relied on the summary provided by the HCCH.

The overview above identified that the general category 'immigration considerations' can be further subdivided into obstacles to return caused by (1) the lack of the relevant immigration permissions to enter, reside and/

203 https://www.incadat.com/en, last accessed on 2 May 2023. The cutoff date for the purposes of the present dissertation is 15 June 2024. More cases have been added following the publication by the HCCH of Prel. Doc No 16 of August 2023, in the context of the Special Commission 10-17 October 2023.

204 Immigration has most commonly been analysed in the context of the settlement defence. The argument here was usually that the lack of (legal) immigration status of the child or of the taking parent should be considered as evidence that the child is not settled Mendoza v. Mendoza, No. 08-55067, 18 March 2009 (United States Court of Appeal for the Ninth Circuit); Re C (A Child), [2006] EWHC 1229 (Fam) (United Kingdom High Court of Justice, Family Division). In this sense see also Cass 2020, Erler 2018, Schuz 2008. These cases are outside the scope of research as there is no immigration obstacle for the parent and child to return to the state of habitual residence.

or work in the country of return (29 judgments) and (1) asylum applications (14 judgments). These two categories of immigration considerations raise different issues, and they shall be analysed separately below. All cases having addressed these issues have been reviewed, irrespective of the court deciding on the case.

In addition, for the purposes of this dissertation research has been conducted into the Central Authorities' responses to the Hague Conference's questionnaires on the operation of the Child Abduction Convention. These questionnaires illustrate the Hague Conference's assessment of topical issues in the field of child abduction. Both more general immigration considerations (such as a lack of visas) and concurrent asylum applications have been directly addressed in these questionnaires, an indication that despite the lack of visibility of immigration in academic literature dedicated to child abduction, it reflects topical practical concerns. Indeed, especially in the latest questionnaire circulated in 2023, 14 out of the 21 countries reviewed confirmed that they have dealt with concurrent child abduction and asylum claims.[205] The most recent conclusions adopted during the latest Special Commission on the operation of the Child Abduction and Child Protection Conventions have also mentioned the issue of child abduction and concurrent asylum claims, and the HCCH has published a Discussion Paper concerning parallel asylum claims during child abduction applications.[206] Moreover, in the recent Guide to Good Practice concerning Article 13(b), the Hague Conference identified immigration considerations as one of the commonly presented defences.

Lastly, it should be pointed out that the actual extent of parents facing immigration law obstacles to return is difficult to estimate for various reasons. On the one hand, not all abduction cases end up in court judgments and, even when they do, not all judgments are published. Also, as will be shown below, immigration is not usually put forth as a stand-alone argument which may sometimes result in this argument being minimised or overlooked in judgments. Moreover, as the responses to the Hague Conference's questionnaires show, child abduction courts hardly consider immigration as a relevant consideration in the return process. This in turn may arguably impact on the parents' willingness to put forth such arguments.

---

205 The responses and the questionnaire are available at https://www.hcch.net/en/publications-and-studies/details4/?pid=8520&dtid=33, last accessed on 3 May 2023. It is recalled that this dissertation has looked in particular at European Union Member States and countries from the European Economic Area as well as the other countries which according to the 2023 Global Report have generated the largest number of outgoing cases, respectively Australia, Canada, New Zealand, the United States and the United Kingdom.

206 Available here: https://assets.hcch.net/docs/5b48f412-6979-4dc1-b4c1-782fe0d5cfa7.pdf, last accessed on 4 January 2024; see also Preliminary document no 16 Prel. Doc. No 16 of August 2023 - Discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim. Here, the HCCH lists another 23 cases emanating from Canada, the US and the UK, some of which have not been added to the INCADAT database.

Nevertheless, in addition to the Hague Conference, a recent European Parliament study has indicated that issues of abduction and immigration are expected to increase.[207] References to immigration have also been included in academic writings on the topic, however except for several contributions addressing the impact of asylum proceedings on child abduction, this topic has received little dedicated attention.[208]

5.6.2 The lack of the relevant immigration permissions to enter, reside and/or work in the country of habitual residence

The 2010 Hague Conference questionnaire specifically inquired on the incidence of immigration/visa questions within the Hague Convention proceedings.[209] The question inquired on whether states had experiences with immigration/visa questions where the child/parent could not re-enter the state from which the child had been wrongfully removed.

Nine (9) of the 23 reviewed responses indicated that these questions have arisen in their jurisdiction. For example, the French authorities confirmed that they have been *frequently* confronted with these questions and that they have directed the parents to competent immigration authorities. When Germany was the country of return, the German Central Authority had sometimes assisted the taking parent in obtaining an entry visa for the duration of custody proceedings. There was no set practice whenever children had to leave Germany following orders under the Hague Convention. German courts have sometimes asked for mirror orders and/or undertakings. Spain equally mentioned being faced with cases where questions of visa arise. The Dutch Central Authority's response is illustrative of how immigration comes into play in child abduction cases. This response elaborates on the causes of immigration issues, namely that breakup results in

207 Children On the Move: A Private International Law Perspective, Directorate General for Internal Policies of the Union, Policy Department for Citizens' Rights and Constitutional Affairs, PE 583.15, 8- June 2017, p. 30, at p. 30: For example, this study mentioned the interview with the Dutch Central Authority where it was reported that a migrant father in The Netherlands requested family reunification with the mother and the child who at the time were located in another EU Member State. Given the mother's refusal, the father claimed wrongful retention by the mother. In another Dutch case, the left-behind mother applied for the return under the Hague Convention and while the application was pending the father and the child –third-country nationals – had left the European Union for the country of origin.

208 A few contributions mention the issue of immigration see for example Martin 2014, p. 336; there are also several scholarly publications concerning the relationship between child abduction and asylum: see Walsh/Atkins 2022; Garbolino 2019; Loo 2016; Norris 2010.

209 The questionnaire is titled 'Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children* (Prel. Doc. No 1 of November 2010)' and it is available at <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=33&cid=24>, last accessed on 2 May 2023.

the taking parent losing residence rights or that residence permits or visas are revoked following a parent's departure from the jurisdiction. The Dutch Central Authority further clarified that practices between states vary with some states offering some form of visa. One case is also mentioned when return was refused on the ground that the caring parent could not return to the country of habitual residence. In The United Kingdom, the lack of immigration status was not a defence in its own right to a return application.

Further, on this point, the response to the HCCH questionnaire from the International Social Service (the 'ISS') is equally relevant in that they point out the existing visa issues which may impede the exercise of contact/custody either as a cause for abduction or as an issue emerging post abduction.[210] The ISS specifically mentioned difficulties for the taking parent caused by the lack of citizenship rights in the country of return. Lack of citizenship disqualifies the person from state benefits such as housing and financial services.[211]

These responses confirm the lack of a uniform practice in dealing with immigration issues. It also becomes evident that if authorities cooperate, -which does not happen on a systematic basis-, it is mostly to ensure a temporary residence permit for the taking parent for the duration of the custody proceedings.

The overview of available case law on immigration considerations within child abduction proceedings reveals a similar position of courts to that of Central Authorities as outlined in the responses to the 2010 Questionnaire. Domestic courts distinguish between the *impossibility to enter* the country of habitual residence and the *potential restrictions upon return* (for example unavailability of social support, impossibility to have a work visa, length of the tourist visa, etc). While the impossibility to enter may in certain exceptional circumstances justify a non-return order under Article 13(1)(b); it does not appear that domestic courts consider any other immigration restrictions upon return as capable of triggering the application of Article 13(1)(b). The reasoning of domestic courts is detailed below.

5.6.2.1 Lack of relevant immigration permission to enter the state of habitual residence

The approach of the national courts to this defence varied from placing little to no emphasis on the arguments related to the visa issue, to providing more reasoning. [212] It should be noted that no consistent approach to the issue was identified within a specific country.

---

210 ISS response to HCCH questionnaire (Prel. Doc. No 1 of November 2010), available at <https://assets.hcch.net/docs/38e6c204-5e07-4e7c-8d65-3328716799b9.pdf>.

211 ISS response to HCCH questionnaire (Prel. Doc. No 1 of November 2010), available at <https://assets.hcch.net/docs/38e6c204-5e07-4e7c-8d65-3328716799b9.pdf>.

212 see for example 2012 QCCA 21, Cour D'Appel, Quebec; Cour de Cassation, Chambre Civile, purvoi 14-17493, 19 novembre 2014, or 2009 9 HLC, Ireland High Court.

For example, one case where such a defence was central was *Garcia Perez v. Polet* decided by the Court of Appeal of Manitoba, Canada in 2014.[213] The case concerned enforcement proceedings of a return order where the mother was objecting to the enforcement on the ground that she was the child's primary carer and given that she had overstayed her visa she could not return with the daughter to the United States. Her main argument was that a return of the child without her primary carer exposed the child to a permanent risk of psychological harm. As she lacked immigration permission to enter the United States, she was in an objective impossibility to accompany her child on return.[214] Another argument was that there was no certainty that she would ever be able to return to the United States, hence there was a risk of a permanent severance of the mother-daughter bond. Within the proceedings for the stay of execution the court looked at whether the mother's uncertain immigration status, coupled with the fact that she was the child's primary carer, could amount to a grave risk of harm under Article 13(b). The court accepted that the mother had always been the child's primary carer. It also accepted that the mother's visa application was pending, and that the outcome and the duration of the visa proceedings were uncertain. The court held however that the level of harm which the child would suffer from the separation did not reach the level required under Article 13 of the Convention. The Manitoba Court of Appeal, in line with existing Canadian case law did not consider that the mere change of the primary carer as a result of the mother's impossibility to return amounted to a grave risk of harm under Article 13 (b) HC. The court further found that some level of contact between the child and the father had existed and that from a financial point of view it would have been easier for the mother than for the father to visit the child. In reaching this conclusion, the Canadian Courts declined to interview the 8 (eight) year old child subject to proceedings on the ground that she was not of a sufficient age and maturity for her age to be considered.

A similar case was decided by the Swiss Federal Tribunal in 2009.[215] The case concerned the envisaged return to the United States of a 21-month-old child without her mother due to the latter lacking an entry visa. The mother had been the child's primary caretaker from before the abduction. The lower court decided not to return the child, accepting that the mother was not capable of returning to the United States, the decision being incumbent upon arrival to a customs inspector. Further, the same court found that there was no certainty that the mother would have been able to reside in the United States during the litigation of custody. However, the father's appeal was upheld and the Swiss Federal Tribunal ordered the return. The Swiss Federal Tribunal contacted the US counterpart directly and they received assurances that the ruling awarding sole custody to the

213 Garcia Perez v. Polet, AF 14-30-08222, 10 September 2014.
214 Garcia Perez v. Polet, AF 14-30-08222, 10 September 2014, para 22.
215 5A_105/2009 Swiss Federal Tribunal, 16 April 2009.

father could be changed subject to his consent. The US court also explained that the mother would not be imprisoned upon re-entering the US. Further, the Swiss court held that the mother was to accompany the child to the US, the latter obligation being discharged solely if the mother failed to obtain the appropriate authorization to enter the country. In a more recent case, the Federal Supreme Court refused to order the return on the ground that a 10-year entry ban had been issued against the mother who was also the child's primary carer.[216] In addition, in this case, a temporary restraining order was in force against the left-behind parent on the grounds of abuse against the child.

The same line of reasoning was adopted in France, where it was not considered that visa issues could be used to hinder return as there were other modalities of contact, during holidays or by electronic means of communication.[217]

South African family courts also dealt with immigration considerations in their judgments.[218] As with the approaches described above, South African courts did not accept that lack of immigration status which would result in the primary carer's impossibility to return to the country of origin could amount to a grave risk of harm for the child.[219] However, in one case the High Court of South Africa accepted that the primary carer put forth justifiable reasons for the impossibility to return.[220] In that specific case, in addition to immigration status there were allegations of domestic violence as well as a lack of appropriate accommodation upon return. Thus, in making the return order the court inserted specific conditions which either the left-behind parent or the British High Commission were expected to comply with. The British High Commission was expected to provide the primary carer with the appropriate travel documentation and grant her leave to remain for a minimum period of three months. The taking parent was also expected to promptly undertake all steps to file the necessary documentation for the travel.

In another case delivered by the Supreme Court of South Africa it appeared that the taking parent was not able to return to the United States as her green card had expired and should she exceptionally be able to return it would only be for a limited period of time and without the possibility of legal employment.[221] The Court did not accept the taking parent's submission that the return should only operate in the eventuality of her being granted permanent leave to remain as it was considered that this would enable her to take advantage of her conduct so as not to return.[222] However,

216 Federal Supreme Court 5A_437/2021, 8 September 2021, HC/E/CH 1523.
217 CA Poitiers, 6 May 2009, No de RG 09/00305, HC/E/FR 1134.
218 Case no. 6090/05; Case no 238/03.
219 Case no 6090/05, para 36.
220 Case no 6090/05.
221 Case no 238/03, para 55.
222 Case no 238/03, para 56.

the South African Supreme Court made the return order conditional on the taking parent having been granted leave to enter and remain in the United States at least until the final adjudication and determination of the custody. Another condition imposed was that the arrest warrant be withdrawn and that the mother was granted interim custody in the United States pending the custody proceedings.

In the United Kingdom, two approaches were apparent. On the one hand, in an older judgement Lord Justice Thorpe relied on the excellent cooperation between United States and British authorities and considered that the risk to not be able to enter for a taking parent was minimal. At the same time reliance was made on the undertakings of the father in relation to spousal support and accommodation for the mother and child upon return.[223] Under a more recent approach it appeared that the High Court justices suspended the proceedings to confirm that the taking parent may obtain a visa to travel and remain for an appreciable period of time in the United States.[224]

Different approaches between courts within the same jurisdiction continued. For example, in the United Kingdom, the High Court ordered the return.[225] The case juxtaposed allegations of domestic violence which the court considered that they could be addressed in the United States and it also relied on the fact that the left-behind parent promised to put some measures in place to alleviate the risk of domestic violence. The High Court equally did not take into account the evidence that the primary carer parent could not enter the United States due to a 10 year entry ban coupled with a small chance (25%) to obtain a humanitarian visa for attending the custody proceedings in the USA. Also, the mother's submissions that she had always been the primary carer were not considered.[226] The Court of Appeal reversed this judgement. The appellate court focused specifically on the separation between the children and their primary carer. Given the parent's immigration position the ensuing separation would last an indeterminate period of time. The Court of Appeal also emphasised that the actions of the primary carer should not be used to punish the children. Therefore, the lower court should have assessed in more detail the situation from the children's perspective and in the case at hand the children could have only returned with their mother. It is also important to note that this court limited the applicability of Article 13(b) until the mother obtained a visa and provided that she pursued her visa application. In other words, a lack of diligence on her part would result in a return order for the children. A similar approach was taken in Scotland where return was made conditional

223 [2001] EWCA Civ 2092.
224 [2017] EWHC 3654 (Fam), followed by [2018] EWHC 1639 (Fam).
225 RE W [2018] EWCA Civ 664.
226 Summary available at https://www.4pb.com/case-detail/re-w-2018-ewca-civ-664/, last accessed on 6 October 2023.

on obtaining an appropriate visa to enter and remain during the custody proceedings.[227]

On occasion, academic literature has highlighted judgments where it was considered that the lack of a visa for re-entry in a country to adjudicate custody proceedings amounted to an extreme example of procedural unfairness.[228]

5.6.2.2 *Immigration restrictions affect the taking parent's access to legal employment or other state-related benefits (housing allowance, social benefits, etc)*

Migration for the purposes of family reunification is still the most common accepted ground for lawful residence worldwide.[229] Spousal separation leaves non-citizens in a precarious immigration position, from loss of the right to reside lawfully to lack of access to housing or other (social) benefits available for permanent residents or citizens.[230] Immigration restrictions have also been presented in child abduction proceedings as defences to return. For example, taking parents have argued that they do not have an independent residence right in the country of habitual residence, their immigration position being contingent on the willingness of a former spouse to sponsor them.[231] In other cases, taking parents submitted that the mere possibility of a tourist visa was not enough to enable a return as in such circumstances the impossibility to work or access social support would result in an intolerable risk for the children. [232] At times the uncertain immigration status affected both parents upon return.[233]

It appears that Hague Convention courts do not consider such immigration defences relevant to Hague Convention proceedings. In general the right to enter on a tourist visa is considered sufficient to not warrant further attention from the Child Abduction Courts.[234] In cases where the complaint is that lawful residence is dependent on the sponsorship by an (abusive) left-behind parent, courts rely on the undertakings of that parent

227 PW v. AL [2003] ScotCS 176.

228 Schuz 2014, p. 358 citing State Central Authority of Victoria v. Ardito, 1997.

229 According to OECD, International Migration Outlook 2023, referred to in <https://www.migrationdataportal.org/themes/family-migration>, last accessed on 11 June 2023.

230 This aspect was also confirmed by the Dutch Central Authority in their responses to the 2010 Questionnaire. For more details, please refer to the section above. HCCH questionnaire (Prel. Doc. No 1 of November 2010), available at <https://assets.hcch.net/docs/38e6c204-5e07-4e7c-8d65-3328716799b9.pdf>.

231 For example *Habimana v. Mukundwa*, 2019 ONSC 1781 or F. v. N., 2022 SCC 51.

232 [2014] EWHC 3799; [2018] IEHC 316; France, Court de Cassation, chambre civile, 14-17493, 19 November 2014.

233 2019 (Ra) No. 636 HC/E/JP 1527.

234 For example 2019 (Ra) No. 636 Appeal case against an order to return the child; HC/E/JP 1527; W. v. W. 2003 SCLR 478, HK/e/Uks 508; Similarly, in France the possibility to enter on a tourist visa, regardless of work or other financial possibilities did not warrant further reasoning – See Court de Cassation, chambre civile, 14-17493, 19 November 2014.

to continue to support the taking parent in their visa application(s) or reject such defences without any further assessment.[235] If there is an indication that the taking parent has missed an appointment with the relevant migration officer, such conduct was presented as evidence of bad will and used as a factor in justifying the return.[236] Requests of parents for evidence in determining their immigration position upon return are not always admitted.[237] In other cases the deterioration of the relationship with the child post abduction due to migration restrictions is considered to fall outside the scope of the analysis.[238]

One notable exception is a 2020 case, where the New Zealand Court of Appeal declined to order the return and took into consideration that the mother did not have access to financial support (including for medical care) through the Australian welfare system, given the type of visa which she held.[239] The court also assessed that it was questionable whether the mother had access to any legal aid for relocation proceedings. It should be noted however that in this case the father had been convicted for breaching family violence orders and bail conditions and the situation of the mother and the child had been particularly volatile. The immigration considerations mentioned above were supplementary to the other domestic violence allegations; they were not the central part of the court's reasoning. In this particular case, the court refused to take into account undertakings from the father due to his previous conduct.

5.6.2.3 The relevance of the distinction primary carer/contact parent

The courts do not always identify the residency arrangements which existed prior to the abduction. However, where available, it appears that the status of primary carer and the argument that residence status will lead to the

235 *Habimana v. Mukundwa*, 2019 ONSC 1781 In this case where the primary carer mother claimed financially and psychologically controlling behaviour from her ex-partner coupled with her own impossibility to enter on an independent visa, Ontario Superior Court of Justice accepted the left-behind parent's undertaking to fill in the necessary forms and agree to continue to sponsor his wife. Undertakings were also accepted in the case of F. v. N., 2022 SCC 51 which concerned a non-Hague Contracting state but was decided on the basis of the Hague Convention principles; CA Bruxelles (3e chambre), 11 Feb 2010; In a case decided by TPI Bruxelles, 2004, N. 03/3585/A The risk of expulsion post-separation was mitigated by the fact that the country where the child were to return had ratified the CRC and therefore the Brussels Court of First Instance was confident that the family courts would take into consideration the relocation request in another country, if it were in the best interests of the child.

236 FC 10701-04-20 *M.B.R. v. Y.R.*, HC/E/IL 1466 the court is reasoning "the Minor will not incur any harm by returning her to the United States. The harm is rooted in the Mother's refusal to return to the United States although she has an entry visa to the United States. The Mother had acted intentionally and in bad faith to prevent the possibility of her obtaining a work visa."

237 FC 10701-04-20 M.B.R. v. Y.R., HC/E/IL 1466.

238 AG Pankow/Weißensee -13 F 8440/19 – 31 January 2020, HC/E/DE 1473.

239 CA/743/2018 [2020] NZCA 209, 3 April 2020, HC/E/NZ 1451.

separation between the child and the primary care weighs heavier in the assessment. In the exceptional situations where immigration defences were allowed, the taking parent was also the primary carer of the child. It should be pointed out that these cases related almost exclusively to the situation where the primary carer was barred from entering the state of habitual residence and not where this person could enter on a tourist visa, albeit deprived of other rights available to citizens or permanent residents.

5.6.2.4 The HCCH Guide to Good Practice

Paragraph 68 of the Guide to Good Practice also addresses the incidence of immigration as a defence to return under Article 13(1)(b) defence. The Guide encourages the cooperation between Central Authorities in obtaining the immigration permissions. Further, it refers to the approach whereby domestic courts have been reluctant to allow the defence where the parent could return for a short period of time necessary for attending the custody proceedings. It can thus be inferred that the Guide considers that immigration considerations only become relevant if the parent is not able to enter the country of return. Further, the Guide places the responsibility on the taking parent by indicating that "the parent should not – through their inaction or delay in applying for the necessary immigration approvals – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish grave risk." No distinction is made between primary carer parents and carers who are not the primary carers.

5.6.3 Parental child abduction and (concurrent) asylum claims

On other occasions, the taking parent and/or the child subject to Hague Convention proceedings had applied for refugee status in the host state.[240] In the 2023 Hague Conference Questionnaire, 14 out of 21 respondent countries confirmed that they had dealt with parallel refugee applications.[241] Hague Convention courts had to decide on whether concurrent asylum claims gave rise to a conflict of laws, or alternatively, if not on the value to attach to asylum applications. An overview of available domestic law and literature on the topic reveal that no uniformity of approach exists in this area either. Key issues coming to the fore concerned conflict of laws, the

240 Cases where the asylum requests had been dismissed while the Hague Convention proceedings were still pending have not been included as those cases did not reveal any conflict of laws issues; the Hague courts could take decisions solely on the basis of the Hague Convention. For such a situation see for example Re F. (Children) (Abduction: Removal Outside Jurisdiction) [2008] EWCA Civ. 854, [2008] 2 F.L.R. 1649.

241 The exact text of the question reads:" Has your State faced any challenges, or have questions arisen, in processing international child abduction cases where there was a parallel refugee claim lodged by the taking parent." The entire questionnaire is available at: << https://www.hcch.net/en/publications-and-studies/details4/?pid=8519&dtid=33>>, last accessed on 5 May 2023.

stay of Hague Convention proceedings and/or the beneficiaries of protection. These issues shall be further elaborated upon below.[242]

5.6.3.1 The relationship between The Hague Convention and the Refugee Convention

Under international law, the 1951 Geneva Convention on the Determination of Refugee Status (the "Geneva Convention" or "Refugee Convention") forms the cornerstone of refugee protection. Article 33 of the Geneva Convention lays down the prohibition against refoulement which has also become customary international law. [243] As per Article 33 states are prohibited from returning individuals to territories where they would face a real risk of persecution on one of the grounds protected by the Refugee Convention.[244] In time, the protection afforded to refugees under the Convention has expanded to include the prohibition of return to places where someone would face a real risk of torture, cruel, inhuman and degrading treatment or punishment, arbitrary deprivation of life, flagrant denial of the right to a fair trial or the right to liberty and security of the person.[245]

An apparent conflict emerged between Article 12 of the Hague Convention whereby the child should be speedily returned to the country of habitual residence and Article 33 of the Refugee Convention prohibiting expulsion. This question was addressed directly by the Ontario Court of Appeal in its judgement of 2 June 2011. [246] The court held that no such conflict of laws existed. The reason was that in essence, the courts dealing with Hague Convention applications had the possibility to apply Article 13 or Article 20, and in applying these Articles they should take into account Article 33 of the Refugee Convention. A refugee determination gives rise to a rebuttable presumption that a risk of persecution exists if the child is returned to the country of habitual residence.[247]

Similarly, in the United States, the Fifth Circuit Court ruled that a grant of asylum did not take precedence over the relief under the Hague Convention.[248] Instead, the grant of asylum was to be considered new evidence,

242 It is important to note that not all the cases concerned countries of habitual residence which were contracting states to the Hague Convention. Especially the United Kingdom cases have been brought by left-behind parents not residing in states parties to the Abduction Convention. However, in the United Kingdom by exercising wardship jurisdiction the domestic courts are using similar principles to the Hague Convention when it comes to non-contracting states (See Mol/Kruger 2018). Moreover, it can be presumed that courts will be more reluctant to scrutinise asylum based defences in Hague cases compared to non-Hague cases.

243 McAdam 2017, p. 4.

244 McAdam 2017, p. 4.

245 J McAdam 2017, pp. 3-4.

246 A.M.R.I. v. K.E.R., 2011 ONCA 41.

247 A.M.R.I. v. K.E.R., 2011 ONCA 417, para 87, and more recently, *Sabeahat v. Sabihat*, 2020 ONSC 2784, para 93.

248 The United States Court of Appeals for the Fifth Circuit, Sanchez, No 12-50783, 1 August 2014.

thus the Hague Convention courts were to assess how Article 13 HC or 20 HC exceptions apply in light of such 'new evidence'.

On the other hand, the England and Wales High Court (Family Division) ruled that "the grant of refugee status of a child is an *absolute* bar to any order by the Family Court seeking to effect the return of a child to an alternative jurisdiction" *[emphasis added].* [249] This represented a departure from a previous approach of the courts where it had been held that the grant of asylum in favour of the child was not a reason to set aside a return order under the Hague Convention.[250] The same position was affirmed recently by the UK Supreme Court where the Court confirmed that the prohibition against refoulement applies to return order under the Hague Convention.[251]

German courts have considered that asylum claims are different from return orders and they have refrained from taking into account the findings of the asylum courts in the child abduction applications.[252] In France, a case was identified where the child abduction courts ordered the return while the asylum claim of the parent was still pending.[253] The family court reasoned that the pending asylum claim was evidence in support of her precarious status in France, thus another reason in support of return.[254] More recently, the French Central Authority has noted that a pending asylum request was taken into account for the purposes of Article 13 (2).[255] This approach is thus similar to that of Canadian courts: asylum applications are used as evidence but fall short from amounting to an obstacle to return.

5.6.3.2 The impact of pending asylum claims on Hague Convention proceedings

When the asylum application is pending, the question was whether child abduction proceedings should be stayed until the determination of the refugee status. This question has arisen when a taking parent and/or a child have lodged an asylum application which was pending when the left-behind parent filed the return petition.[256] In other cases, the Hague Con-

249 [F and M and A and the Secretary of State for the Home Department Joint Counsel for the Welfare of Immigrants, [2017] EWHC 949 (Fam), para 44.

250 *Re H* (A Child) [2016] EWCA Civ 988.

251 *G v. G* [2021] UKSC 9, para 129. In this case, some of the intervenors had argued that a return order under the Hague Convention is different in nature to the prohibition against refoulement, and for this should result in the Court finding that there is no conflict of laws.

252 As per the response to the 2023 HCCH Questionnaire, available at <https://assets.hcch.net/docs/e8143069-376a-4e5c-a7e2-353a4e080e28.pdf>, last accessed on 5 May 2023.

253 Cour d'appel Versailles, 2e chambre, 1re section, 24 November 2016, no 16/05302.

254 Cour d'appel Versailles, 2e chambre, 1re section, 24 November 2016, no 16/05302.

255 As per the response to the 2023 HCCH Questionnaire, available at: <https://assets.hcch.net/docs/5175d97b-45fb-4d1b-b8fb-cd719bfded8e.pdf>.

256 In the case of F and M and A and the Secretary of State for the Home Department Joint Counsel for the Welfare of Immigrants, [2017] EWHC 949 (Fam), the taking parent filed the asylum applications on 15 September 2014. The return proceedings under the Hague Convention had commenced on 10 March 2015. Her son, A filed the asylum request on 26 June 2015.

vention application came before courts when an appeal against an asylum application is pending.[257] Should then the courts vested with the Hague Convention application await the final outcome of the asylum request? Is it then relevant if an applicant was denied asylum and is appealing such a decision or if the asylum was granted and it is subject to appeal by the immigration authority, or another party entitled under domestic law to file such an appeal?

Available case law suggests that domestic courts tend to overlook this question.[258] What is instead evident is that family courts on a recurrent basis have stressed that the purpose of the Hague Convention is to have children returned speedily to their country of habitual residence.[259] In a case where the return was ordered despite the mother's pending asylum claim, Justice Thorpe expressly mentioned the swiftness of proceedings in the family courts as opposed to the implicitly less- swift proceedings on the immigration side.[260] Also, the family courts put forward the objective of swift return under the Hague Convention as a reason for not requesting the left-behind parent to seek the annulment of the refugee status prior to ruling on a Hague Convention application.[261] The UK Supreme Court has recently examined this question into more detail.[262] This court has analysed various provisions of domestic and EU law and distinguished between situations when asylum applications are manifestly unfounded (and identified as such by the Secretary of State) and situations which were awaiting a decision from the Secretary of State. In the latter situation, ordering a return would deprive the child of an effective remedy in the asylum application.[263] However, while the Hague Convention courts have an obligation not to implement a return order, they do not have to suspend the proceedings; such assessment shall be carried out on a case-by-case basis, following some criteria established by the UK Supreme Court.[264]

257 This was for example the case in Re S (Children) (Abduction: Asylum Appeal) [2002] EWCA Civ 843.

258 For example, Cour d'appel Versailles, 2e chambre, 1re section, 24 November 2016, no 16/05302. One exception is the case of Sanchez where the US Circuit Court mentioned that the Office of Refugee Resettlement was expected to answer a question on whether a procedure in the immigration court preempts or stays the actions of the Family Court. The answer however is not apparent in the judgement –one possible explanation being that at the time of rendering the aforementioned court decision the children had been granted asylum in the United States.

259 Among many other authorities Mol/Kruger 2018, L v. R, 2022 ONCA 582 HC/E/CA 1534; R v. G [2022] EWHC 655 (Fam) HC/E/UKe 1561.

260 Re S (Children) (Abduction: Asylum Appeal) [2002] EWCA Civ 843.

261 A.M.R.I. v. K.E.R., 2011 ONCA 417, paras 84 and 85.

262 G v. G [2021] UKSC 9.

263 G v. G [2021] UKSC 9, para 152.

264 G v. G [2021] UKSC 9, paras 170-172.

5.6.3.3 *Persons subject to return*

In the United Kingdom, a differentiated approach was taken depending on who has requested the asylum. The UK courts distinguished between situations where only the taking parent had filed the application listing the children as dependants and situations where the children were asylum seekers in their own right.[265] In the former case, the Appellate Court of England and Wales ordered the return despite the fact that the taking parent's appeal against a negative asylum decision was pending at the time of the judgement in the Hague Convention proceedings. In that case, the Appellate Court accepted the father's undertakings to provide adequate support and protection upon return. The mother who filed the asylum request had argued that she had been subjected to domestic abuse and marital rape in the country of origin. In ordering the return, the court specifically referred to the fact that the children had not been themselves asylum applicants or appellants.[266]

Where the children were themselves asylum seekers the approach in the United Kingdom was different. As stated above, the approach in 2017 of the High Court of Justice was that "the grant of refugee status of a child [...] is an absolute bar to any order by the Family Court seeking to effect the return of a child to an alternative jurisdiction".[267] A more recent approach is to look less strictly at whether the children had filed applications in their own name; being named dependants in an asylum claim resulted in the application of the non-refoulement rules to Hague Convention courts.[268]

On the other hand, in the cases decided by the United States' courts and Canadian Courts the asylum grant did not preclude a return order under the Hague Convention. The United States Fifth Circuit Court ruled that it is not necessary to revoke the asylum grant before enforcing a return order under The Hague Convention. The court considered that the discretionary grant of asylum does not confer a right to remain in the United States despite Hague Convention return orders. In the court's reasoning "The asylum grant does not supersede the enforceability of a district court's order that the children should be returned to their mother, as that order does not affect the responsibilities of either the Attorney General or Secretary of Homeland and Security under the INA [n.a. Immigration and Nationality Act]"[269] Instead, judges in the family courts were to take into account the asylum grant when deciding whether any of the exceptions listed under the Hague Convention applied.

---

265 See for eg Re H (child) [2016] EWCA Civ 988 as opposed to RE S (Children) (Abduction: Asylum Appeal) [2002] EWCA Civ 843.

266 RE S (Children) (Abduction: Asylum Appeal) [2002] EWCA Civ 843, para 27.

267 F and M and A and the Secretary of State for the Home Department Joint Counsel for the Welfare of Immigrants, [2017] EWHC 949 (Fam), para 44.

268 G v. G [2021] UKSC 9, paras 116-134.

269 Sanchez, No 12-50783, 1 August 2014, para 20.

A similar approach, albeit with a stronger emphasis on the weight to be accorded to the refugee status, was adopted in Canada. On this basis the court ruled that a child's refugee status represents a rebuttable presumption that the Article 13 (b) exception was engaged.[270] Thus, pursuant to this judgement, Hague Convention (family) courts in Canada are able to disregard a refugee status and nevertheless order the return. The Ontario Court of Appeal expressly ruled that it was not necessary for the left-behind parent to request the rescission of the refugee status prior to proceeding under the Hague Convention.[271]

5.6.3.4 Procedural fairness

The domestic judges dealing with the overlap between the Hague Convention and asylum requests were also faced with several issues of procedural fairness of the parties, especially the position of the left-behind parent in the immigration courts. For example, when deciding that the grant of the refugee status for a child was an absolute bar for the return the United Kingdom, the High Court of Justice took into account that the left-behind parent had the possibility to challenge in the immigration courts any potential misrepresentation of the taking parent/child which resulted in the grant of asylum.[272] This possibility is to be contrasted to the situation in Canada where a left-behind parent could not apply to rescind an order granting a child refugee status; only the Minister of Citizenship and Immigration could do that and his power was discretionary.[273] This also formed part of the considerations of the United States Court where it was stated that the left-behind parent did not have the possibility to participate in the asylum claim.[274] On a related note, it has been highlighted that confidentiality is essential to asylum proceedings whereas co-operation and transmittal of information is at the core of the Hague Convention.[275]

Other procedural considerations which the courts took into account were related to evidence and the difference in the standards of proof between Hague Convention Proceedings and asylum proceedings. In the United States, the Circuit Court mentioned that the evidentiary burdens under the asylum and Hague schemes were different, the former using the 'preponderance of evidence' standard while the latter using the 'clear and convincing' evidence standard.

---

270 2011 ONCA 417, para 75.

271 2011 ONCA 417, paras 84 and 85.

272 F and M and A and the Secretary of State for the Home Department Joint Counsel for the Welfare of Immigrants, [2017] EWHC 949 (Fam), para 63; F and M [2018] EWHC 1639 (Fam), para 51.

273 2011 ONCA 417, para 86.

274 Sanchez, No 12-50783, 1 August 2014.

275 See also the responses to the 2023 Questionnaire of Switzerland, France, available at <<https://www.hcch.net/en/publications-and-studies/details4/?pid=8520&dtid=33>>, last accessed on 5 May 2023.

Following a recent case in the United Kingdom, case management guidance was issued on processing child abduction proceedings with concurrent immigration claims.[276] In addition, in this jurisdiction, the participation of the Secretary of State -the authority responsible for deciding on asylum applications- to child abduction proceedings was discussed.[277]

The case law above is illustrative for some of the issues domestic courts are facing when dealing with Hague Convention applications where asylum requests are pending or have been granted to either the taking parent or to the children. The cases analysed indicate that for domestic courts the fact the taking parent was granted asylum is not in itself a reason not to enforce a Hague Convention application. So far only in the United Kingdom have the courts considered the grant of refugee status as an absolute bar to ordering the return of the child. It should be perhaps noted that the case in question envisaged a return to Saudi Arabia which is not a Hague Convention contracting state. Nevertheless, the wording of the High Court of Justice does not seem to indicate that the reasoning was tailored to the fact that the case concerned a non-Convention country. Furthermore, the UK Court of Appeal clearly distinguished between situations where the child himself had been granted refugee status and those where the taking parent has been granted status and the child(ren) received protection as dependants, i.e. derived from that of the parent. For the other jurisdictions, Canadian and American courts considered that Hague Convention courts can take the asylum grant into consideration when deciding to apply Article 13 or Article 20 of the Hague Convention. As discussed in Chapter IV above, the decision on whether to apply Articles 12 or 20 of the Hague Convention is within the discretion of the family courts. Therefore, this view implies that an authority vested with a Hague Convention application could disregard an asylum grant altogether, being a matter completely within its discretion to decide on the return pursuant to the Hague Convention. This view also indicates that family courts may re-evaluate the findings of immigration authorities and decide if a child is to be nevertheless returned.

It appeared that among the reasons for favouring one approach over the other, courts looked in particular to the following factors (i) whether the left-behind parent participated in or could challenge the outcome of the asylum application; (ii) the time needed for resolution of the asylum application as opposed to the necessary swiftness required under the Hague Convention proceedings. In the United Kingdom the possibility of a left-behind parent to challenge potential misrepresentations made while applying for asylum was put forward as a reason for seeing the grant of asylum as an absolute bar in ordering the return under the Hague Convention. Conversely, the Ontario Court of Appeal expressly mentioned that this

276 United Kingdom response to 2023 Questionnaire, available at <https://assets.hcch.net/docs/85bfde82-f290-4656-b223-864ccf96b5d9.pdf>> last accessed on 5 May 2023.

277 G v. G [2021] UKSC 9, paras 116-134, para 174.

was not an open avenue under Canadian law, thus any misrepresentation under the asylum procedure could eventually only be addressed within the Hague Convention case. This was not mentioned in the United States case; however the Circuit Court did rely on the fact that the left-behind parent did not have the possibility to participate in the asylum procedure whereas such possibility was afforded within the family dimension.

5.7 Conclusions

This Chapter has focused on the exceptions to the return of the child which have given rise to controversy in the application of the Child Abduction Convention. In order to contextualise these exceptions, three separate subsections have incorporated wider discussions around the same topics. Thus, Section 5.2 included an overview of the emergence of domestic violence as a human rights concern in feminist scholarship followed by a discussion on domestic violence from the perspective of children's rights. Second, Section 5.4.1 addresses the topic of primary carer abductions in the context of the change in the notion of custody across the most relevant jurisdictions for the purposes of the Child Abduction Convention. Third, Section 5.5 introduced existing discussions around the intersection between immigration and family law on the one hand and the relationship between domestic violence and immigration on the other hand.

This Chapter also includes an overview of existing approaches and domestic child abduction case law related to these exceptions. It should be noted that while the topics of domestic violence and primary carer abductions have received (substantial) attention in scholarship, the same does not apply to immigration considerations. In this dissertation it is shown that immigration considerations as they have been presented in child abduction applications can be indicative of domestic violence, raise issues of parent/child separation or are indicative of power imbalances in the country of habitual residence. So far, there is no harmonised approach to such considerations, nor is there any guidance for domestic courts on how to resolve immigration-based exceptions to return. The case law analysis shows that domestic courts have approached immigration considerations as distinct from domestic violence and have rarely considered such situations as amounting to a grave risk of harm to the child. The commitment of the Child Abduction Convention to the best interests of children in general justified leaving most immigration considerations to the legal system of the habitual residence. Even when authorities in the same country as the child abduction courts have decided that the taking parent and/or the child are refugees, and thus face a serious fear of persecution in the country of habitual residence, courts deciding on child abduction applications override the assessment of the risk of persecution in the name of the ultimate goal of protecting the child from harm. Yet, this is a general policy consideration, and it does not amount to an assessment of the situation of that individual child.