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Return travel and Covid-19 as a grave risk of harm in Hague Child Abduction Convention cases

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Since February, 2020, courts have been faced with many novel arguments concerning the Covid-19 pandemic in return proceedings under the "grave risk exception" provided in Article 13(1)(b) of the 1980 Hague Convention. This article presents an analysis of judgments delivered by courts internationally which concern arguments regarding the safety of international travel in return proceedings during the Covid-19 pandemic. While courts have largely taken a restrictive approach, important clarity has been provided regarding the risk of contracting Covid 19 as against the grave risk of harm, as well as other factors such as ensuring a prompt return despite practical impediments raised by Covid-19 and about quarantine requirements in the context of return orders. Given that the pandemic is ongoing, it is important to reflect on this case law and anticipate possible future issues.

Keywords: child abduction; Hague Convention; grave risk of harm; intolerable; return travel; courts; Covid-19; coronavirus; pandemic; safety of international travel.

A. Introduction

The emergence of the Covid-19 pandemic almost immediately gave rise to the use of novel arguments under Article 13(1)(b), testing the bounds of the Convention on the Civil Aspects of International Child Abduction (hereinafter, "the 1980 Hague Convention").[1] Article 13(1)(b) provides that an order to return the child is not required where, "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the

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[1] The text of the Convention is available here: HCCH | Conventions, Protocols and Principles

child in an intolerable situation". The gravity of the pandemic is evident given the almost uniform reaction of States internationally, closing borders, imposing lockdowns and introducing a raft of public health measures. As a rapidly evolving health emergency, courts have been presented with an unenviable task of honouring the purpose of the 1980 Hague Convention, while also ensuring that a correct decision is made in a "highly fact-specific"[2] case regarding the exposure of the respective child(ren) to harm and/ or an intolerable situation as a result of the pandemic. It is within this context that the 1980 Hague Convention coincidentally marked its 40th anniversary in 2020, facing such unanticipated challenges.[3]

The exception to the duty to return a child provided in Article 13(1)(b) has been discussed many times by courts internationally. Lady Hale and Lord Wilson observed in the Supreme Court in the United Kingdom, that "article 13b is pleaded in the great majority of statements of defence in such cases".[4] A study by Beaumont *et al* also reported that "Article 13(1)(b) Hague is used more often than the other Article 13 exceptions".[5] Meanwhile, a statistical analysis of applications under the 1980 Hague Convention in 2015 by Lowe and Stephens showed that "the most frequently relied upon ground for refusal was Article 13(1)(b) (47 applications, 25%)".[6] According to the Secretary General of the Hague Conference on Private International Law, "(t)he increasing use in recent years of this defence in child abduction cases, and a growing concern amongst the expert community that an incorrect

[2] These cases are notoriously "highly fact-specific"; The Hague Conference on Private International Law – HCCH Permanent Bureau, (2020) *1980 Child Abduction Convention, Guide to Good Practice, Part VI, Article 13(1)(b)*, p. 17, [7]. Available here: 225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf (hcch.net)
[3] The Hague Conference on Private International Law published a number of resources aimed to assist parties during the Covid-19 pandemic: Permanent Bureau of The Hague Conference on Private International Law, *Toolkit for the 1980 Child Abduction Convention in times of Covid-19* (2020) available here: 2aee3e82-8524-4450-8c9a-97b250b00749.pdf (hcch.net) The Hague Conference on Private International Law, *Covid-19 Toolkit* (2020) available here: 538fa32a-3fc8-4aba-8871-7a1175c0868d.pdf (hcch.net)
[4] *Re E (Children)* [2011] UKSC 27, [2012] 1 AC 144, [9].
[5] P Beaumont, L Walker & J Holliday, "Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU" (2016) 12 *Journal of Private International Law* 211-260, at 222.
[6] N Lowe and V Stephens, *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*, (2018) [15]. Available here: HCCH | A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

application of this provision would compromise the delicate balance struck by the Child Abduction Convention" meant that it was necessary to publish a dedicated *Guide to Good Practice on the interpretation and application of Article 13(1)(b) of the Convention* (hereinafter "*Guide to Good Practice*").[7] This *Guide to Good Practice* was also published in 2020.

This article considers the treatment of arguments concerning the safety of international travel during the Covid-19 pandemic by courts in a range of jurisdictions. In particular, it considers the treatment of Covid-19 as a grave risk of harm in respect to return travel in itself, under the 1980 Hague Convention. Focus rests on whether the Covid-19 pandemic gives rise to circumstances wherein the Article 13(1)(b) exception may be successful in delaying an order to return the child(ren) to their state of habitual residence. Part B of this article discusses the purpose of the 1980 Hague Convention and outlines the limited exceptions to the duty to return a child. The *Explanatory Report* on the 1980 Hague Convention, authored by Pérez-Vera, as well as the *Guide to Good Practice* are considered as part of this.[8] Part B also provides a brief overview of the interpretation of Article 13(1)(b) to date.

Part C, meanwhile, discusses the treatment of Covid-19 in the context of the grave risk of harm exception in judgments delivered internationally from February, 2020, to June, 2021. The methodology used in this research is explained in Part C. While courts have also been asked to engage in a comparison of the gravity of the pandemic in particular Contracting States, and the management of the pandemic in those Contracting States, this article will not concentrate on this aspect. Instead, analysis will be directed to the court's reasoning and decisions regarding the safety of international travel and the return of children to their state of habitual residence

[7] This *Guide to Good Practice* aims "to promote, at the global level, the proper and consistent application of the grave risk exception in accordance with the terms and purpose of the 1980 Convention", (n 2) at 15, [3]. For an overview of the development of the Guide to Good Practice, in particular regarding domestic and family violence, see O Momoh "The interpretation and application of Article 13(1) b) of the Hague Child Abduction Convention in cases involving domestic violence: Revisiting *X v Latvia* and the principle of 'effective examination'" (2019) 15 *Journal of Private International Law* 626-657.
[8] *Guide to Good Practice, Part VI, Article 13(1)(b), supra* n 2.

in the midst of an ever-changing global health crisis. Part C also seeks to anticipate how future judgments regarding the application of Article 13(1)(b) may be decided. Finally, Part D presents conclusions. It is evident from the case law to date, that courts have almost universally held that arguments around the safety of international travel during the Covid-19 pandemic do not give rise to circumstances wherein Article 13(1)(b) provides a satisfactory exception in respect of the return of children. Courts have largely taken a restrictive approach, in line with other case law under Article 13(1)(b).[9] Given that the pandemic is ongoing, with continuing developments regarding variants, vaccines and scientific research as to the health impact of Covid-19, this article seeks to provide an opportunity to reflect on the interpretation of the 1980 Hague Convention in the judgments which have been delivered to date, and possible future issues.

B. **The 1980 Hague Convention and Article 13(1)(b)**

1. ***The 1980 Hague Convention***

The Supreme Court of Canada has described the 1980 Hague Convention "as one of the most important and successful family law instruments completed under the auspices of the Hague Conference on Private International Law".[10] The objects of the 1980 Hague Convention, described in Article 1, are:

> a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[9] See, for example, P Ripley "A Defence of the Established Approach to the Grave Risk Exception in the Hague Child Abduction Convention" (2008) 4 *Journal of Private International Law* 443-477, at 445-446.
[10] *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, at [22].

In addition, courts are required to "act expeditiously in proceedings for the return of children", and a six-week timeframe is directed, although as McEleavy points out, "even where returns have been ordered it has rarely been possible to meet the time limits envisaged in Article 11 of the 1980 Hague Convention".[11] This is also evident in more recent case law, where the Covid-19 pandemic has had an impact, raising practical impediments frustrating a prompt return of children.[12]

Articles 12, 13 and 20 of the 1980 Hague Convention provide Contracting States with limited exceptions to the duty to return a child. According to the *Explanatory Report* on the 1980 Hague Convention, the exceptions to the duty to return a child "… are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter".[13] Indeed, Pérez-Vera stated that:

> a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.[14]

The next section will focus on the exception provided for in Article 13(1)(b) of the 1980 Hague Convention, which courts have sought to interpret in the light of this understanding, as set out in the Explanatory Report.

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[11] P McEleavy, "The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?" (2015) *Netherlands International Law Review* 62: 365-405 at 371.
See also, the preamble and Art 1, which both reference the "prompt return" of children as well as Art 11(1) of the 1980 Hague Convention.

[12] OLG Karlsruhe 2 UF 200 19 (Bes. Haftbef.); *Stefanska v. Chyzynski* (2020) ONSC 3048. See the discussion of these cases in Part C of this article.

[13] Hague Conference on Private International Law, *Explanatory Report on the 1980 HCCH Child Abduction Convention*, at [34]. Available here: HCCH | Explanatory Report on the 1980 HCCH Child Abduction Convention

[14] *Ibid*, at [34]. As Beaumont and McEleavy explained, while "[t]he battle to ensure that Article 13(1)(b) and Article 20 were restrictively drafted was undoubtedly hard fought", this presented "few problems when one envisages the stereotype which inspired delegates in 1980; that of the young child being snatched from its mother by a disenchanted father"; P Beaumont and P McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999), 138. Nevertheless, in circumstances where it is predominantly the primary carer who wrongfully removes or retains a child, courts have "on the whole been rigorous, strictly adhering to the drafters' intentions". *Ibid*, 155. According to Ripley, "the high hurdle in establishing the defence should remain in place", *supra* n 9, 454-455 and 463.

2. ***Interpretation of Article 13(1)(b)***

Article 13(1)(b) provides:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that – …
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The exception set out in Article 13(1)(b) provides what has become known as the "grave risk exception", and incorporates three distinct elements: a grave risk of physical harm, a grave risk of psychological harm and a grave risk of an intolerable situation. According to Pérez-Vera, when describing Article 13(1)(b) specifically, "(e)ach of the terms used in this provision is the result of a fragile compromise reached during the deliberations of the Special Commission and has been kept unaltered".[15] In *Re E (Children)*, the Supreme Court in the United Kingdom, drawing on the decision of the High Court of Australia in *DP v Commonwealth Central Authority*[16], stated "that there is no need for the article to be 'narrowly construed'. By its very terms, it is of restricted application".[17] In considering the meaning of "grave", the UK Supreme Court noted that:

> (a)lthough 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.[18]

In *Re D (A Child) (Abduction: Rights of Custody)* Baroness Hale stated that:

[15] *Explanatory Report on the 1980 HCCH Child Abduction Convention*, *supra* n 13, [116].
[16] [2001] HCA 39, (2001) 206 CLR 401, at [9] and [44].
[17] *Re E (Children)* [2011] UKSC 27, [2012] 1 AC 144, [31].
[18] *Ibid*, [33].

> there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it. A restrictive application of article 13 does not mean that it should never be applied at all.[19]

As McEleavy noted, "just as a lax interpretation would subvert the objectives of the Convention, so would one which was excessively strict".[20]

Pérez-Vera has explained that the exceptions outlined in Article 13(1)(b) "clearly derive from a consideration of the interests of the child".[21] Despite this, it is evident that return proceedings should not "mandate a full 'best interests assessment' for a child within return proceedings".[22] The Hague Conference on Private International Law makes clear that the provision in Article 13(1)(b) is "'forward-looking' in that it focuses on the circumstances of the child upon return and on whether those circumstances would expose the child to a grave risk".[23] Importantly, this means that the court's analysis must not be limited to:

> the circumstances that existed prior to or at the time of the wrongful removal or retention. It instead requires a look to the future, i.e., at the circumstances as they would be if the child were to be returned forthwith. The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence.[24]

The interpretation of Article 13(1)(b) is required to be restrictive, yet forward looking. As noted by the UK Supreme Court in *Re E (Children)*, "article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country".[25] It is envisaged that:

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[19] *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [51].
[20] P McEleavy, *supra* n 11, at 377.
[21] *Explanatory Report on the 1980 HCCH Child Abduction Convention*, *supra* n 13, [29].
[22] *Guide to Good Practice* (n 2), at p 25, [26].
[23] *Ibid*, at p 27, [35]. This was also reiterated in a number of judgments in UK courts. See, for example, *Re E (Children)* [2011] UKSC 27, [35] and *Re C (Children) (Abduction Article 13(b))* [2018] EWCA Civ 2834, [50].
[24] *Guide to Good Practice*, *supra* n 2, at p 27, [36].
[25] *Re E (Children)* [2011] UKSC 27, [35].

> the exceptions serve a legitimate purpose, as the Convention does not contemplate an automatic return mechanism. Allegations that there is a grave risk should be promptly examined to the extent required by the exception, within the limited scope of return proceedings.[26]

C. Covid-19 and return travel

1. *Methodology*

This Part presents an analysis of judgments delivered by courts internationally between February, 2020, and June, 2021, available on INCADAT, Westlaw, Lexis, CommonLII and vLex Justis wherein arguments concerning the safety of international travel because of Covid-19 were raised as an exception to return under Article 13(1)(b). This author searched these case law databases for the following terms individually and together: "grave risk" AND "travel" AND "covid" OR "corona", from 1st February 2020 to the year to date in 2021. This search yielded 38 cases from INCADAT, 47 cases from Westlaw, 36 cases from LexisLibrary, 29 cases from CommonLII and 12 cases from vLex Justis.[27] This author then reviewed these cases, screening for duplicates and examining whether Covid-19 was raised under Article 13(1)(b) as an exception to return in respect to the safety of international travel. Only English language judgments were selected. This resulted in 18 relevant judgments, which includes two appeals and one re-hearing.[28] Analysing these cases, this author focused on the overarching treatment of Covid-19 under Article 13(1)(b), with a particular focus on the treatment of the

[26] *Guide to Good Practice*, *supra* n 2, at p. 25, [27]. For a thorough consideration of the interpretation of Art 13(1)(b), see, for example, Ripley *supra* n 9 and Momoh *supra* n 7.

[27] This author limited the search of vLex Justis to case law in Ireland while all jurisdictions were searched in the other case law databases. Last accessed, 08 July, 2021.

[28] *KR v. HH* [2020] EWHC 834 (Fam); *Onuoha v. Onuoha* 2020 ONSC 1815; *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65; *Comar v. Comar* [2020] FamCAFC 99; Department of Child Safety, Youth & Women v. Comar [2020] FamCA 505; OLG Karlsruhe 2 UF 200 19 (Bes. Haftbef.); OLG Thüringen 1 UG 11 20; *ZA v. BY, In the matter of K (a minor)* [2020] NIFam 9; *The Father vs. the Mother*, FC 52595-02-20, The Family Court in Tel Aviv – Yaffo; *R v. BR*, Family Appeal 10701-04-20; *D v. E* [2020] EWHC 3257 (Fam); *Stefanska v. Chyzynski* (2020) ONSC 3048; *Rainey v. Summers* (2020) ONSC 6165; *Department of Communities and Justice v. Ruiz* [2021] FamCA 98, [116]; *CB v. BM*, (2021) ABQB 151; *C v. G* [2020] IEHC 217; *C v. G* [2020] IECA 233; *JV v. QI* [2020] IECA 302. (Author's Note: *R v. BR* is an appeal from *The Father vs. the Mother* and *C v. G* [2020] IECA 233 is an appeal from *C v. G* [2020] IEHC 217. The rehearing involved this case: *Comar v. Comar* and *Department of Child Safety, Youth & Women v. Comar*).

safety of international return travel to the state of habitual residence as a grave risk of harm. This article presents a discussion of 14 of these cases, which contributed most to the parameters outlined.[29]

2. *Safety of international travel*

Prior to the onset of the Covid-19 pandemic, it would appear that there were few cases wherein the grave risk exception was successful in respect of concerns around the safety of international travel in return proceedings. The high threshold of the grave risk exception was met, however, in the case of *State Central Authority v. Maynard* wherein it was held that air travel posed a grave risk of harm to the child's physical health.[30] In that case, the Family Court of Australia held that while the child, H.M. was wrongfully removed from England to Australia, the mother had established a grave risk exception under Article 13(1)(b) as evidence before the court demonstrated that the child could not physically travel on a plane as a result of recurring seizures from epilepsy. Indeed, evidence suggested that "a flight to England in the foreseeable future might be fatal".[31]

The grave risk exception in respect of air travel during the Covid-19 pandemic was raised in multiple cases, including the case of *KR v. HH* before Mr Justice Rees in the Family Division of the High Court in England and Wales in March 2020.[32] In that case, the father, KR, sought the return of PT, an 11-year-old child, to Spain following their removal by the mother, HH, to the United Kingdom. HH made a number of arguments including the "health risks posed by the current coronavirus pandemic".[33] In considering this ground, Mr Justice Rees noted that

[29] The following cases, although relevant, were excluded as they did not contribute significantly to the research being undertaken: *Onuoha v. Onuoha*; *Comar v. Comar*; *Department of Child Safety, Youth & Women v. Comar*; *ibid*.
[30] *State Central Authority v. Maynard* [2003] FamCA 911.
[31] *Ibid*, [26].
[32] *KR v. HH* [2020] EWHC 834 (Fam).
[33] *Ibid*, [29].

HH's argument concerned "the risk of physical harm" from the coronavirus pandemic and this included, "(t)he increased risk of infection that is posed by international travel at this time".[34] Mr Justice Rees, taking judicial notice of UK government advice stated that while:

> international travel at this time potentially carries with it a higher prospect of infection than remaining in self-isolation … limited international flights between the UK and Spain continue to be permitted by those governments for essential travel.[35]

Accordingly, the judge stated "(f)rom that I infer that the risk of infection posed by air travel, whilst no doubt significantly greater than normal, is not so high that either government has felt necessary to end flights altogether".[36] Mr. Justice Rees ordered the return of PT to Spain, stating that:

> whilst I accept that the travel associated with a return is likely to increase the risk that PT could contract coronavirus, I do not consider that such a risk when considered in the context of the likely harm that would be suffered by PT should she contract the virus, is sufficient to amount to the grave risk of physical harm required by Art. 13(b).[37]

A different view was taken by the High Court in Ireland in *C v. G* where Simons J. concluded that ordering the return of the child, Jan, to Poland "would give rise to a 'grave risk' that he would be exposed to physical and psychological harm".[38] In making this finding, the judge stated that "to require the child to engage in international travel during the coronavirus pandemic would expose him to a grave risk of contracting the disease".[39] In addition, the judge stated that government advice was that unnecessary travel should be avoided and it was also unclear if commercial flights would be available or if it was even feasible to travel. The Court of Appeal overturned the decision of the High Court and held that:

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[34] *Ibid*, [46].
[35] *Ibid* [47].
[36] *Ibid*.
[37] *Ibid*.
[38] *C v. G* [2020] IEHC 217, [29].
[39] *Ibid*, at [29].

> any increased risk of Jan contracting the virus (whether from air travel or from being in Poland) … is not sufficient, in itself, to prove that a grave risk of physical harm would arise in the event that a return order were to be made.[40]

Power J. explained that "a distinction must be drawn between a grave risk of harm and a probability of infection. Whereas gravity qualifies the risk referred to in Article 13(b) it is, nevertheless, linked to the harm envisaged in the defence set out therein".[41] According to Power J., "[c]are must be taken, therefore, not to conflate a moderate or even high risk of contracting Covid-19 with a grave risk of harm should one become infected with the virus".[42] The judge noted that while "the risk of contracting Covid-19 is a relevant factor in the assessment of grave risk, that risk cannot, in and of itself be equated with a grave risk of harm".[43]

Equally, in *JV v. QI*, Whelan J. in the Court of Appeal in Ireland considered arguments from the mother opposing return of the children to Belgium, including that "international travel during the coronavirus pandemic would expose the two children to a grave risk of contracting the disease".[44] The judge held, however, that the threshold to establish grave risk had not been met, commenting that:

> [t]ravel, including international travel, must necessarily carry or import some element of risk. The necessity for travel has been brought about by the wrongful removal of the children by their mother which took place at a time when the pandemic had not abated.[45]

In *CB v. BM*, the mother BM contended that international travel, returning the children to France from Canada, posed "physical risks" to the children under Article 13(1)(b) because of the Covid-19 pandemic.[46] Kiss J. concluded that:

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[40] *C v. G* [2020] IECA 233, [89].
[41] *Ibid*, [80].
[42] *Ibid*.
[43] *Ibid*.
[44] *JV v. QI* [2020] IECA 302, [74].
[45] *Ibid*, [97]. See also, *CT v. PS* [2021] IEHC 168 and the appeal in *CT v. PS* [2021] IECA 132 which discuss this case law.
[46] *CB v. BM* (2021) ABQB 151, [90].

based on the limited evidence provided to me during the hearing, I am unable to conclude that the risk of the children contracting Covid-19 if they are directed to return to France, as opposed to remaining in Canada, is sufficient to amount to the grave risk of harm required to satisfy Article 13(b).[47]

3. *Reconciling Covid-19 arguments with the objects of the 1980 Hague Convention and the interpretation of Article 13(1)(b)*

The case law contains many important points to note, including with regard to balancing the objects of the 1980 Hague Convention with parties' concerns about return orders during the Covid-19 pandemic. While the Irish High Court in *C v. G* appeared to break new ground when it found that ordering the return of a child to Poland gave rise to a grave risk exception because of exposure to contracting the disease, this was swiftly overturned by the Court of Appeal which clarified that a risk of contracting Covid-19 for a child cannot be equated with a grave risk of harm.[48] The judgments in ***KR v. HH***, *JV v. QI* and *CB v. BM* all used similar reasoning to that of the Court of Appeal in *C v. G*.[49]

Other cases have also expounded important principles regarding the objects of the 1980 Hague Convention and the interpretation of Article 13(1)(b) in the context of the Covid-19 pandemic. In *Rainey v. Summers*, for example, the mother claimed, citing Article 13(1)(b), that it was not safe for the child to travel from Canada to Missouri because of the Covid-19 pandemic.[50] The Ontario Superior Court of Justice held that a parent's:

[47] *Ibid*, [115].
[48] *C v. G* [2020] IEHC 217; *C v. G* [2020] IECA 233.
[49] *KR v. HH* [2020] EWHC 834 (Fam); *JV v. QI* [2020] IECA 302; *CB v. BM* (2021) ABQB 151; *C v. G* [2020] IECA 233.
[50] *Rainey v. Summers* (2020) ONSC 6165, [19].

> good intentions to protect the child from exposure to the Covid-19 virus during the pandemic … cannot be used … to unilaterally change the child's habitual residence or the custody and access order.[51]

Similarly, in *R v. BR*, the mother argued that returning a 16-month-old child to the United States from Israel "poses a severe health risk due to the corona virus".[52] The mother's arguments in this regard concerned "exposure of the Minor to airports and flight" as well as the fact that "the epidemic in the United States is not under control at this point".[53] The Appellate Court supported the decision of the District Court, quoting its *dicta* that:

> the emergency situation cannot be exploited for change status de-facto disregarding the Minor's rights, her Father's rights and ignore the provisions under International Conventions designed for ensuring minors' rights and intended to settle complex legal and urgent situations between countries.[54]

The Appellate Court ordered the return of the child to the US.

Further, two cases are important when considering the object of the 1980 Hague Convention to secure the prompt return of children.[55] In a decision of OLG Karlsruhe, a short-term delay was permitted in the return of children from Germany to the United States because of arguments made by their mother that it was not possible to travel as a result of the Covid-19

[51] *Ibid*, [23].
[52] *R v. BR*, Family Appeal 10701-04-20, [17].
[53] *The Father vs. the Mother*, FC 52595-02-20, The Family Court in Tel Aviv – Yaffo, [165]. This case appeared before the Family Court in Tel Aviv in February 2020, and the Court did not engage directly with the argument regarding air travel, instead concentrating on the pandemic as follows: "There is no dispute that the corona epidemic exists in both countries … it had been proven that it is precisely the Minor's stay in Israel with no health insurance and no HMO which is riskier for Minor than return to her country of origin where she is a citizen and has appropriate health insurance [174].
[54] *R v. BR*, Family Appeal, 10701-04-20 [19].
[55] OLG Karlsruhe 2 UF 200 19 (Bes. Haftbef.)*; Stefanska v. Chyzynski* (2020) ONSC 3048. See also, *ZA v. BY, In the matter of K (a minor)*[2020] NIFam 9 which concerned the need for protective measures to be put in place prior to the child's return to the Netherlands from Northern Ireland because of domestic violence under Art 13(1)(b). The High Court in Northern Ireland noted that while Covid-19 was not raised "as a factor to be taken into account in the Article 13(b) consideration", it could affect practical arrangements [31]. However, in this case there were no travel restrictions in place between the Netherlands and Northern Ireland at that time, in July 2020, and there was no need for the parties to quarantine. Keegan J. made the important point that "I have applied the principles underpinning the Convention first and then considered practical arrangements" [31].

pandemic in March 2020.[56] In that case, the mother' appeal against an order to return the children from Germany to the United States was dismissed by the Higher Regional Court in February 2020. On 17th March 2020, the Court accepted the mother's arguments and postponed travel until 29th April 2020. On 2nd June 2020, the father sought enforcement of the order. The Court noted that the mother and the children were US citizens and were therefore not affected by travel restrictions to the US. In addition, they would not be required to stay in a hotel for the 14-day quarantine period. The Court held that the mother be incarcerated for 10 days unless the children were voluntarily returned to the father. Accordingly, a short delay only was permitted. Equally, in *Stefanska v. Chyzynski*, where the Ontario Superior Court of Justice ordered the return of the children, Horkins J. underlined that "[t]he *Hague Convention* requires that the return be 'forthwith'".[57] The judge observed, however, that:

> their immediate return is complicated by the Covid-19 pandemic and the resulting problems with international travel … However, their return must not be unnecessarily delayed.[58]

Several courts have taken judicial notice of public health advice regarding return travel and while this is an important element of decision making in these cases,[59] it is possible that future cases will see expert evidence being called in respect to Article 13(1)(b) and the child's physical and psychological health, and the implications of return travel as a result of Covid-19. It remains to be seen how courts might treat a case where the child has an underlying health condition, for example, and accordingly their physical health may be at more risk from Covid 19. Indeed, Williams J. appeared to hint at this point in *Department of Communities and Justice v. Ruiz*, when it was stated that: "[t]here is no evidence of any particular vulnerabilities of X or her mother to international air travel".[60] It is foreseeable, therefore, that expert evidence may

[56] OLG Karlsruhe, *ibid*.
[57] *Stefanska v. Chyzynski*, *supra* n 55.
[58] *Ibid*, [106].
[59] *KR v. HH* [2020] EWHC 834 (Fam); *JV v. QI* [2020] IECA 302; *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65.
[60] *Department of Communities and Justice v. Ruiz* [2021] FamCA 98, [125]. In that case, the mother opposed the return of her child to Ireland from Australia, arguing that "the Covid-19 pandemic posed a grave risk" because of

be sought in circumstances where a child or their parent has certain vulnerabilities. Further, in *Walpole v. Secretary, Department of Communities and Justice*, Ryan J and Aldridge J stated that they were taking judicial notice "that there are now strict international travel restrictions in place".[61] The judges made clear, however, that they "would have required further submissions concerning the effect on the children and the mother of being ordered to return to New Zealand in the present crisis" if the appeal had not been allowed for other reasons.[62] It is contended here that it is important that judges clearly express the grounds for their decisions in circumstances where a party raises concerns regarding the safety of international travel in the context of the Covid 19 pandemic.[63] As Momoh commented:

> even in circumstances where evidence is ambivalent, a merits exercise should be undertaken, however limited, with a ruling on specific reasons in light of the facts of the case, before considering the effectiveness of protective measures.[64]

Further, while the grave risk exception concerns harm to children, it is possible to query the risk that a child could transmit Covid-19 to the left behind parent or other person who cares for them on return.[65] This could be significant if that party is vulnerable or has an underlying

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increasing rates of infection in Ireland, the mother's inability to access the health system and the fact that full lockdown government restrictions were in place; [116]. While the mother did not appear to specifically address "the risk of international air travel", Williams J. addressed the point at [124] and held that the Covid-19 pandemic did not constitute a grave risk to the child or her mother.

[61] *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65, [9]. In that case, noting that both Australia and New Zealand had strict border closures, the judges commented that they were responding to "a request by New Zealand to return the children" and accordingly they "have proceeded on the basis that the children and the mother are still able to leave Australia and enter New Zealand" [9].

[62] *Ibid*, [9].

[63] It is worth recalling the comments made by the Grand Chamber of the European Court of Human Rights in *X v. Latvia* {GC} (Application no. 27853/09) Grand Chamber [2013], when discussing the harmonious interpretation of the European Convention on Human Rights with the 1980 Hague Convention. In that decision, the Grand Chamber emphasised the importance of courts "genuinely" considering "the factors capable of constituting an exception to the child's immediate return" and "make a decision that is sufficiently reasoned on this point"; [106]. According to the Grand Chamber, "… when assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case" [107].

[64] Momoh *supra* n 7, 646.

[65] Studies are underway regarding children's ability to transmit Covid-19. See, for example, D Buonsenso and P Valentini, "Children and SARS-CoV-2 transmission: a step closer to better understanding and evidence-based interventions?" (2021) *Clinical Infectious Diseases* https://doi.org/10.1093/cid/ciab559, as referred to on the website of the World Health Organization: Children and SARS-CoV-2 transmission: a step closer to better understanding and evidence-based interventions? | Clin Infect Dis;2021 Jun 18. | MEDLINE (bvsalud.org) These authors stated that data from a Catalan study shows that "while children can transmit the infection, they

health condition, and their illness could impact the child's care in their State of habitual residence. While some jurisdictions impose a mandatory quarantine period following return travel, it would be interesting to see whether courts would set their own protective measures such as requiring quarantine periods and/or testing to be put in place, in order to prevent a child from spreading Covid-19 to other members of their household in the state of habitual residence.[66] In the absence of such precautions, the child's care may be affected if their carer(s) became ill.

Indeed, courts have commented on mandatory quarantine in the context of international travel and orders to return children. In *D v. E*, for example, the mother argued that it would be intolerable, within the meaning of Article 13(1)(b) for her children to quarantine in an Australian hotel for 14 days, should a return order be made. The judge held, however, that quarantine requirements are not "capable of founding an Art 13b defence under the Convention".[67] Equally, a decision of OLG Thüringen refused an application by the Youth Welfare Office "to have enforcement of the return order issued by Jena Local Court – Family Court – deferred for a limited period due to the current coronavirus pandemic".[68] In that case, the Court held that the scheduled return of a child from Germany to Australia on 18th March 2020, should go ahead as planned, and in accordance with a required 14-day quarantine:

> According to the information collected by the Chamber, there are currently no impediments to the child entering Australia with her mother, despite the coronavirus pandemic. The Respondent

do at a lesser degree than adults do", at 3. It is acknowledged however that "this study was performed before the new variants became predominant in Europe, and their findings may therefore not automatically translate to the new scenarios", at 3.

[66] There have been a number of studies which show that quarantine measures and testing can effectively reduce travel related transmission of Covid-19. See, for example, CJ Chiew, Z Li and VJ Lee, "Reducing onward spread of COVID-19 from imported cases: quarantine and 'stay at home' measures for travellers and returning residents to Singapore" (2020) 27 *Journal of Travel Medicine* DOI: 10.1093/jtm/taaa049; MA Johansson, H Wolford, P Paul, PS Diaz, T-H Chen, CM Brown, *et al*, "Reducing travel-related SARS-CoV-2 transmission with layered mitigation measures: symptom monitoring, quarantine, and testing" (2021) *BMC Medicine*, DOI https://doi.org/10.1186/s12916-021-01975-w

[67] *D v. E* [2020] EWHC 3257 (Fam), [123].

[68] OLG Thüringen 1 UG 11 20, [I].

> and [name redacted] are merely obligated to undertake self-isolation for 14 days upon their arrival in Australia. This protective measure does not endanger the child's wellbeing.[69]

D. Conclusions

Over the past 18 months, courts have faced many novel arguments in respect to the Covid-19 pandemic, testing the 1980 Hague Convention and its object of promptly returning children to their state of habitual residence. There will likely continue to be further cases in which the grave risk exception is raised, given continuing developments regarding new variants, international access to vaccines and further research on the impact of Covid-19 on children's health. This article considered the treatment of arguments around the safety of international travel during the Covid-19 pandemic as a grave risk of harm in return proceedings under the 1980 Hague Convention. While one case found that ordering the return of a child gave rise to a grave risk exception because of exposure to contracting the disease, this was overturned. Further, while another case permitted a short delay in returning a child, courts have commonly not adopted this approach. Finally, two cases have offered clarity around the court's views as to quarantine requirements in the context of return orders. It may be concluded that courts have largely taken a restrictive approach, but individual cases have presented many challenges for courts to consider.

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[69] *Ibid*, [II].