Saada v. Golan: Ignoring the Red Flags of Domestic Violence Danger and What Is Required to Protect a Child From "Grave Risk"

by Lynn Hecht Schafran*

In the recently decided Hague Convention[1] case of **Saada v. Golan**,[2] the Second Circuit Court of Appeals wrote, "[W]e address the scope of a district court's discretion to direct that a child be returned where 'there is grave risk of harm that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." The Second Circuit is known for pressing for return even in cases with a finding of "grave risk," using so-called "ameliorative measures" or "undertakings." The left-behind parent "undertakes" to live by a list of conditions rarely enforceable by the country imposing them, and typically enforceable in the country of habitual residence only after entry of a mirror order.

Undertakings are not part of the Convention. They are a judge-made invention based on the erroneous assumption that the left-behind parent, *who by his own behavior created the grave risk*, will overnight reform and live by a set of conditions wholly out of step with his past behavior.

The District Court found that Mr. Saada's abuse of his wife was vicious and relentless, and the child's need for protection clear. But the Second Circuit reaffirmed its commitment to undertakings in the name of comity, creating such a high barrier to a finding of their inadequacy that the taking parent will seldom be able to leap it.

Saada v. Golan: The District Court Opinion

Isacco Saada, an Italian citizen, and Narkis Golan, a U.S. citizen, married in Milan in 2015 and lived there

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with their son, "B.A.S.," born in 2016. In July 2018, while in New York with B.A.S., Ms. Golan decided not to return to Milan. In Milan, Mr. Saada filed a criminal complaint against her and a petition for sole custody; in New York, he petitioned for B.A.S.'s return under the Hague Convention. Ms. Golan opposed Mr. Saada's petition, citing article 13(b).

The District Court acknowledged that B.A.S.'s return would expose B.A.S. to a grave risk of exposure to harm because of the severity of Mr. Saada's wife-abuse and the harm from exposure. But the judge ordered return with certain conditions, noting that she did "not come to this conclusion lightly."[3] She detailed Mr. Saada's screaming, cursing, slapping, punching, grabbing, kicking, dragging, hair pulling, public humiliations, vile name calling, verbal sexual abuse, physical sexual abuse, attacks during pregnancy, ripping of vaginal tissue, "chilling" recorded phone calls, attempted strangulation, and death threats. The judge acknowledged that B.A.S. was subjected to an environment of relentless toxic stress which both parents' expert witnesses agreed was highly damaging. Dr. Edward Tronick, a leading developmental psychologist, testified:

> [E]xposure to domestic violence has immediate effects on young children's cognitive, social, and emotional development and their ability to "regulate stress." It also has physiologic effects and both immediate and long-term effects on the brain structure and organization... [E]xposure to domestic violence could have particularly severe effects on a child as young as B.A.S. because of the state of brain development at that age. Continued exposure or re-exposure to domestic violence, whether directed at the

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> child or witnessed by the child, has a cumulative effect on the child and increases the likelihood of later effects.[4]

After finding that return would expose B.A.S. to a "grave risk," the judge cited Second Circuit precedent and considered "whether there are 'any ameliorative measures by the parents and by the authorities of the state having jurisdiction over the question of custody that can reduce whatever risk might otherwise be associated with the child's repatriation.'"[5] Both parties provided a list of potential undertakings; Ms. Golan did so only under protest that "no undertakings could ensure B.A.S.'s safety."

Mr. Saada agreed to these five undertakings: (1) give Ms. Golan $30,000 for housing in a secret location, financial support and legal fees until the Italian courts address those issues; (2) stay away from Ms. Golan and only exercise visitation with B.A.S. with her consent until the Italian courts address this issue; (3) seek dismissal of the criminal charges he initiated against her; (4) begin cognitive behavioral therapy; and (5) waive all rights to legal fees or expenses.

Ms. Golan appealed these undertakings because they are unenforceable.

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The Second Circuit Court of Appeals Opinion

The Second Circuit Court of Appeals opinion has a bait and switch quality. The court first noted that "unenforceable undertakings are generally disfavored, particularly where there is reason to question whether the petitioning parent will comply...." It accepted "the District Court's findings that 'Mr. Saada has to date not demonstrated a capacity to change his behavior,' has 'minimized or tried to excuse his violent conduct,' and 'could not control his anger or take responsibility for his behavior.'" It held that "the District Court erred in granting the petition subject to (largely) unenforceable undertakings despite adverse factual findings concerning Mr. Saada's credibility and the absence of other sufficient guarantees of performance." But what did the appellate court do next? It could have acknowledged the danger Mr. Saada posed and granted the "grave risk" defense outright. Instead, the Court of Appeals remanded to the District Court with a directive to investigate every possible way to create enforceable undertakings and return the child.

This remand underscores the exceedingly high bar to a successful article 13(b) defense. To show that undertakings will not work, this opinion appears to require proof that *the left-behind parent already flouted court orders* and thus can be expected to do so again. The Circuit cites as models only two cases where U.S. courts acknowledged that "a foreign court order might not suffice," both of which turned on the fact that the petitioner "had a long history of ignoring court orders" (**Simcox v. Simcox**, 511 F. 3d 594, 608 (6th Cir. 2007)) and "there was 'every reason to believe '" that he would do so again (**Walsh v. Walsh**, 221 F.3d 204, 221 (1st Cir. 2000)). The Second Circuit's *Saada* opinion imposes an all-but-impossible burden on the taking parent who raises a 13(b) defense and thereby *increases the risk to the child.*

Impact of the Remand on the Child, B.A.S.

B.A.S. is being subjected to ongoing toxic stress. His welfare is inextricably bound up with his mother's, and she lives in fear of Mr. Saada and the potential outcome of this case. The short video, "First Impressions: Exposure to Violence and a Child's Developing Brain,"[6] explains why infants and young children are profoundly impacted by exposure to chronic domestic violence, with long-term, even lifetime impacts.

Neuroscience both confirms and explains the vast social science literature on the negative impact of children's exposure to domestic violence. In an article by nine neuroscientists, pediatricians, physicians, and public health experts titled, "The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence From Neurobiology and Epidemiology," the authors wrote:

> "[T]he detrimental effects of traumatic stress on developing neural networks and on the neuroendocrine systems that regulate them have until recently remained hidden even to the eyes of most neuroscientists...
>
> The convergence of evidence from neurobiology and epidemiology calls for an integrated perspective on the origins of health and social problems through the lifespan."[7]

The Adverse Childhood Experiences Study, known as ACEs, documented that negative experiences in childhood—including exposure to domestic violence specifically—correlated directly with children's problematic physical and mental health and behavior as adults.[8] Courts hearing Hague Convention cases need to be aware of the neuroscience and the ACEs' findings so they understand that returning a child after a finding of "grave risk," and creating delays to upholding a 13(b) defense by exploring all possible undertakings, creates toxic stress that harms the children the Convention is supposed to protect.

The Erasure of Mr. Saada's Sexual Violence and Why it Matters

The District Court's Findings of Fact open with a list of the kinds of abuse to which Mr. Saada subjected Ms. Golan: "The evidence established that Mr. Saada and Ms. Golan fought frequently, and that Mr. Saada physically, psychologically, emotionally and verbally abused Ms. Golan." This list is notable for its omission of sexual violence, despite Ms. Golan's repeated testimony about Mr. Saada's sexual abuse before, during, and after her pregnancy.

In her testimony "Ms. Golan claimed generally that Mr. Saada forced her to have sex 'a lot,' and that there were times when she asked him to stop, and he refused; on at least one occasion B.A.S. was in the bed with them. On one occasion Mr. Saada threw her on the bed, grabbed her crotch and demanded, 'Who owns you, huh? Who owns you?' He pressed his thumbs on her throat until she blacked out, and raped her. Mr. Saada denied this accusation and insisted that he never raped or sexually assaulted Ms. Golan." She described an incident during consensual sex in which she felt pain but Mr. Saada refused to stop, resulting in a trip to the hospital where she was diagnosed with "ripped tissue." She described "an incident of forcible sex right after B.A.S. was born that caused her internal stitches to rip."

The District Court's omission of sexual violence from its list obscured Mr. Saada's dangerousness. It prevented an informed analysis of undertakings and the risk of harm to the child, which might have affected the Court of Appeals' view of this case.

According to Professor Jacquelyn Campbell, the foremost authority on domestic violence lethality, a physically abused woman subjected to forced sex is almost twice as likely to be killed as a woman subjected to physical violence only. In a study of Houston women seeking orders of protection, those who were being both physically and sexually abused reported more of the risk factors for femicide, such as strangulation and threats to children, than those subjected to physical abuse only. A National Institute of Justice study found that over half of women raped by an intimate partner were victimized repeatedly.[9]

Sexual violence committed against the mother also impacts her children. In *Children's Exposure to Intimate Partner Sexual Assault,* Kathryn Ford writes, "[I]ntimate partner sexual assault is associated with more severe depression, anxiety, and behavior problems in the children of adult victims, as

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compared to those whose mothers have been physically, but not sexually, abused." Children exposed to intimate partner sexual abuse in their parents' relationship often "internalize distorted and unhealthy messages about gender and sexual consent."[10]

How Dangerous Is Mr. Saada?

Professor Campbell created the *Danger Assessment* risk instrument utilized by law enforcement, victim advocates, health care providers, and others across the country. One question is "Has he ever forced you to have sex when you did not wish to do so?" The Idaho *Dangerousness in Domestic Violence Policy for Law Enforcement* provides this urgent guidance. For cases "in which attempted strangulation, recent separation, forced sex, and extreme possessiveness or controlling behavior exist...these have been demonstrated across some studies as significant predictors of lethality. It is recommended that, *no matter how many factors [on the complete Danger Assessment instrument] contain a checked item, contact with the victim should be made within 24 hours.*[11] (emphasis in the original)

During a 2017 trip to New York, Ms. Golan went to a police precinct in Brooklyn where she "completed a form with pre-printed questions and checked 'Yes' to questions that asked whether Mr. Saada had threated to kill her or her child, strangled or choked her, and beaten her while pregnant." Her trial testimony is replete with descriptions of sexual abuse and assault. When a domestic violence victim responds "yes" to danger assessment questions about strangulation, attacks during pregnancy and overt threats to kill, and provides extensive testimony about forced sex, these are the reddest of red flags for escalating violence and femicide. It defies reality to believe "undertakings" can contain an abuser who is this dangerous.

Mr. Saada's Abuse: Out-of-Control *and* Premeditated

Another indicator of Mr. Saada's dangerousness is his deliberate, premeditated use of instrumental violence to control Ms. Golan. Mr. Saada's expert witness, Dr. Alberto Yohananoff, and the District Court painted him as completely out-of-control, driven by frustration and anger, and having no capacity to change his behavior. But he was adept at using instrumental violence—employing just the kind and severity of insult, intimidation, threats, and actual physical and sexual violence needed to maintain control over his wife.

In *When Dating Becomes Dangerous*, the authors write,

> A violent or abusive person repeatedly (1) tries to get their way by forcing or coercing the other person; (2) verbally attacks, demeans, or humiliates the other person in order to get and keep control over them; (3) uses or threatens to use physical force against the other person; and/or (4) forces the other person to participate in sexual acts.
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> Violent and abusive behavior is not the same as getting angry or having a fight. It happens again and again, and one person is afraid of and intimidated by the other.[12]

This description fits Mr. Saada to a T. Here is his own testimony about his deliberate abuse of his wife, who he knew had suffered serious child abuse:

> "I knew when I met Narkis that she came from a broken home and she really come [sic] with the best intention the first time to Milano. I know I did a lot of mistakes, too. I'm a cheater, I get violent, I say things that I shouldn't say, maybe sometime I, in a stupid way, I took advantage – not advantage, but not – *I felt comfortable doing certain things because she didn't know to, maybe protect herself. I mean, I did a lot of bad things to Narkis....*" (Emphasis supplied.)

Fulfilling the Purpose of the Hague Convention on the Civil Aspects of International Child Abduction

Judge Shireen Fisher, in her 2004 paper "Abduction Then and Now: Assumptions, Biases and Realities," described herself as a strong supporter of the Convention, and expressed her concern that courts are thwarting its purpose. The Convention, she wrote, was drafted on an outdated premise—that taking parents would be dissatisfied fathers. Today, "[t]he large majority of abducting parents are mothers who are often the primary caregiver...and often are fleeing with their children from domestic violence." She wrote of the "myth of deterrence," and the unreliability of undertakings:

> I believe that with the best of intentions, courts have applied the Convention too broadly and have interpreted the exceptions too narrowly. This happened because courts wished to protect as many children as possible from the harm of abduction, and this interpretation succeeds in those cases that fit the original stereotype of parental abduction. Nevertheless, that stereotype does not represent the majority of the cases coming before us. As a result, the biases that have developed based on the unrealistic stereotype are working injustices and harming the children the treaty was designed to protect.
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> [T]he interest of the child is paramount.[13]

Are the courts ready to accommodate change? Let us hope so.

Very similarly, in 2017 Lady Brenda Hale, President of the Supreme Court of the United Kingdom, wrote:

> [T]he fact that the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings does not mean that they are not at the forefront of the whole exercise.[14]

One cannot overstate the evolution of our understanding of domestic violence and its impact on children since the 1980 Hague Convention was drafted. A once "private matter" has become a major public concern. Domestic violence "choking" is

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understood to be "strangulation" that causes traumatic brain injury and is actually attempted murder. Evidence-based research has produced sophisticated risk assessments. When victims respond "yes" to questions about strangulation and forced sex, attacks during pregnancy, and overt threats to kill, it is understood as waving red flags for potential lethality and immediate referral for safety planning.

While it was once thought that children were unaffected by domestic violence, voluminous social science and neuroscience research have shown that exposure to domestic violence is profoundly harmful to every aspect of a child's mental, emotional and physical health from day one, with consequences across the lifespan.

This knowledge should inform and guide judicial decision making in article 13(b) cases. As Judge Fisher wrote, when the Hague Convention was drafted it was thought by many that the best way to realize the Hague's purpose was to protect the interests of the courts of habitual residence in the name of comity by maximizing returns in order to deter abductions, and that "it is acceptable to sacrifice a few children for the good of the many who will be saved from future abduction because parents are deterred by their knowledge of sure return." At the end of *Abduction Then and Now* Judge Fisher wrote:

> The good news is that the Convention is flexible enough to accommodate change.
>
> The question is, are the courts?

Let us hope so.

End Notes

1. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1341 U.N.T.S. 89 [hereinafter "Hague Convention"].

2. **Saada v. Golan**, No. 19-820, slip op. (2d Cir. Jul. 19, 2019).

3. **Saada v. Golan**, No. 18-CV-592 (E.D.N.Y. Mar. 22, 2014).

4. *See also* Schafran, Lynn Hecht (Summer 2014). Domestic Violence, Developing Brains and the Lifespan: New Knowledge from Neuroscience, Judges' J. 32.

5. **Blondin v. Dubois ("Blondin II")**, 238 F. 3d 153 (2d Cir. 2001).

6. Available at *http://www.youtube.com/watch?v=brVOYtNMmKk*.

7. Anda, Robert F., et al. (April 2006). The enduring effects of abuse and related adverse experiences in childhood: A convergence of evidence from neurobiology and epidemiology. *Eur. Archives of Psychiatry & Clinical Neuroscience, 256()*, 174. Reprinted in NIH Public Access 8. Available at *http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3232061/pdf/nihms340170.pdf*.

8. Centers for Disease Control, Adverse Childhood Experiences Study (ACEs). Available at *https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/index.html*.

9. Schafran, Lynn Hecht (Jan.-Feb. 2010). Risk assessment and intimate partner sexual abuse: The hidden dimension of domestic violence *Judicature, 93(4)* at 161 and citations therein. *See also* National Judicial Education Program, Intimate Partner Sexual Abuse: Adjudicating This Hidden Dimension of Domestic Violence Cases: free web course available at *www.njep-ipsacourse.org*.

10. Ford, Kathryn (2008). Children's exposure to intimate partner sexual assault. *Family & Intimate Partner Violence Quarterly 1(2)*, 141.

11. Available at *https://idvsa.org/initiatives/idaho-coordinated-response/*. Page 1 of this form, with the quotation cited above, is not on the Internet, but is on file with the author.

12. Occhiuzzo Gigams, Patti & Levy, Barrie (2013). *When dating becomes dangerous: A parent's guide to preventing relationship abuse* (p. 3) Hazelden.

13. Unpublished paper written for the National Association of Women Judges Hague Convention Parental Liaison Network Committee, on file with this author.

14. Hale, Brenda (Dec. 2017). *Taking Flight—Domestic Violence and Child Abduction*, 70 Current Legal Problems 3. Available at *https://academic.oup.com/clp/article/70/1/3/4082282*. ■