To Return or Not To Return – That Is The Question: Tensions Between Non-Refoulement and Orders of Return Under the Hague Abduction Convention

by
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I. Introduction

Eleven thousand, four-hundred and fifty-four migrants entered the United States as refugees in 2021.[2] A refugee is someone who is unable or unwilling to return to their country of nationality, or someone who is "unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[3] This class of migrants are eligible to apply for legal status from the U.S. government to live in the United States as either a "refugee" or an "asylee." A person sitting outside of the United States may apply for "refugee" status, while a person who has already entered the United States may apply for "asylum" status. Refugee status indicates that the person is of special humanitarian concern to the United States, with certain priority categories, including those referred by the United Nations High Commissioner for Refugees (UNHCR), a U.S. Embassy, or certain non-governmental organizations (Priority One), special humanitarian cases (Priority Two), and family reunification cases

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2 Ryan Baugh, *Refugees and Asylees: 2021*, U.S. Citizenship & Immigration Servs., U.S. Dep't. of Homeland Security (Sept. 2022), https://www.dhs.gov/sites/default/files/2023-03/2022_0920_plcy_refugees_and_asylees_fy2021_v2.pdf.

3 8 U.S.C. § 1101(a).

(Priority Three).[4] In 2021, the United States only accepted referrals from UNHCR in the Priority One category.[5] Asylum status is available to any foreign national physically present in the United States, [6] so long as they meet certain requirements, and must be applied for within one year of entry to the country, with certain exceptions.[7]

This article will focus on asylum-seekers – specifically parents who cross an international border, enter the United States with their child, and then apply for asylum status on behalf of themselves and/or their child. Asylum-seekers who are physically present in the United States and are granted asylum status typically cannot be removed under the principle of non-refoulement, established in several international agreements, including the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol).[8] The United States is bound by the 1967 Protocol to comply with Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees,[9] "with respect to 'refugees' as defined in Article 1.2 of the Protocol" even though the United States is not a signatory to the Convention.[10] Article 33.1 of the Convention states that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The Refugee Act of 1980[11] was enacted in the United States to "bring United States refugee law into conformance with the [1967 Protocol]."[12] The principle of non-refoulement is entrenched as part of the United States' commitment to international human

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4 Baugh, *supra* note 2.

5 *Id.*

6 *Asylum*, U.S. Citizenship & Immigration Servs., U.S. Dep't. of Homeland Security (Aug. 7, 2023), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum.

7 Baugh, *supra* note 2.

8 19 U.S.T. 6223, T.I.A.S. No. 6577 (Jan. 31, 1967) (acceded to by the United States in 1968).

9 *See generally* 189 U.N.T.S. 137, 150 (July 28, 1951).

10 INS v. Stevic, 467 U.S. 407, 416 (1984).

11 Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in various sections of Title VIII of the U.S. Code).

12 INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987).

rights through the Refugee Act of 1980. Article 243(h) of the Refugee Act, which amended prior discretionary language, stated that "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[13] Federal law, however, grants broader protection to those who are granted asylum (rather than any alien) by simply prohibiting their removal or return to their "country of nationality . . . or last habitual residence."[14]

If an asylum-seeker is a parent, they may bring their child with them when they enter the United States and seek the same legal status for their child. Depending on the family's circumstances, the child may have been removed from their home country and brought into the United States without the proper permission of the other parent or home courts, qualifying that child's migration as a child abduction, with potential civil and criminal implications, including under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention).[15]

The Hague Abduction Convention, ratified by the United States in 1988,[16] is an international treaty that establishes a civil mechanism for the prompt return of children under the age of sixteen when they have been removed from or retained outside of their habitual residence in violation of custodial rights. The Convention is in force between the United States and eighty other countries.[17] The Convention does not, however, offer remedies in all international child abductions because not all countries are Contracting States to the Convention, and for those Contracting States that have acceded

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13 This was subsequently amended to read that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

14 8 U.S.C. § 1158(c)(1)(A).

15 Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (entered into force for the United States on July 1, 1988) ("Hague Abduction Convention").

16 *Status Table* (of Contracting Parties), Hague Conference on Private International Law (Nov. 14, 2022), https://www.hcch.net/en/instruments/conventions/status-table/?cid=24.

17 *Id.*

to the Convention, the United States has not accepted all acceding countries as partners. This article will focus on child abductions into the United States by asylum-seekers that fall within the parameters of a Hague Abduction Convention case.

In 2019, the U.S. Department of State Office of Children's Issues opened 488 cases where a parent brought their child into the United States from a country that is a treaty partner with the United States under the Hague Abduction Convention.[18] In that same year, of the top ten countries yielding asylum-seekers into the United States, five were also in the top ten countries for incoming cases of parental child abduction under the Hague Abduction Convention[19] – Honduras, Mexico, Guatemala, Colombia, and Venezuela – with abductions from Honduras accounting for 31% of all reported incoming abduction cases.[20] It seems inevitable then that there is overlap in asylum and child abduction cases.

In Part II, this article will explore existing U.S. asylum jurisprudence and examine how U.S. courts have addressed the tension between non-refoulement of an asylum-seeker and returning an abducted child. In Part III, this article will highlight some prospective legal issues, such as ameliorative measures or returns to a third country, that may arise out of this tension in future Hague Abduction Convention cases in the United States.

II. Tensions in Asylum Applications and the Return of Abducted Children

While the Hague Abduction Convention provides a civil remedy to return abducted children, children are not always returned. The Hague Abduction Convention provides for limited exceptions to the return remedy. These exceptions include that: (1) rights of custody were not breached; (2) the abduction was consented or

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18 *Incoming Hague Convention Cases to the U.S. Central Authority: Applications Made for Return and Access in 2019,* U.S. Dep't. of State, https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/CY%202019%20New%20Reported%20Incoming%20Cases.pdf (last visited Sept. 19, 2023).

19 Ryan Baugh, *Refugees and Asylees: 2019*, U.S. Citizenship & Immigration Servs., U.S. Dep't. of Homeland Security (Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf.

20 *Id.*

acquiesced to; (3) there is a grave risk that a child's return would expose the child to physical or psychological harm or an intolerable situation; (4) the child is mature and objects to the return; (5) the child is settled in the new environment after the parent requesting the return delayed in requesting such a return for a year or more; or, (6) a return would not be permitted by "the fundamental principles . . . relating to the protection of human rights and fundamental freedoms."[21] There is no exception based on a child's immigration status. However, a child's immigration status (and, in more limited circumstances, a parent's immigration status) could be considered as one factor in a broader analysis.[22]

It is unsurprising, therefore, that tensions can materialize between the principle of non-refoulement and the return remedy in Hague Abduction Convention cases. On the one hand, the Secretary of Homeland Security[23] is expressly prohibited from removing or returning a person who is granted asylum in the United States to that person's country of nationality or last habitual residence.[24] On the other hand, the courts[25] of the United States are mandated to return a child who was wrongfully removed to or retained in the United States forthwith, short of one of the limited exceptions, upon the request of a person actually exercising rights of custody over that child.[26] It has, therefore, come to pass that

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21 Hague Abduction Convention, *supra* note 15.

22 *In re* Ahumada Cabrera, 323 F. Supp. 2d 1303 (S.D. Fla. 2004); Alanis v. Reyes, 230 F. Supp. 3d 535 (N.D. Miss. 2017) (discussing immigration status and "unsteady and temporary nature of the living arrangements in the United States").

23 On March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist as an independent agency within the Department of Justice and its functions were transferred to the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 451, 471, 116 Stat. 2135 (Nov. 25, 2002). USCIS assumed INS's authority over asylum applications. *Id.* at § 451. All references to the Attorney General in that statute now refer to the Secretary of Homeland Security. *See* 6 U.S.C. § 557 ("With respect to any function transferred by or under this chapter . . . reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred shall be deemed to refer to the Secretary, other official, or component of the Department to which such function is so transferred."); *see* Sanchez v. RGL, 761 F.3d 495 (5th Cir. 2014), U.S. Amicus Brief, n.9.

24 8 U.S.C. § 1158(c)(1)(A).

25 22 U.S.C. § 9003(b).

26 Hague Abduction Convention, *supra* note 15, art. 12.

there are children in the United States who either have an asylum application pending or who have been granted asylum and cannot be removed from the United States by the federal government, but where a U.S. court nonetheless orders that the child return, in some cases, back to where they fled perhaps for fear of persecution. Both proceedings address circumstances in another country, and the impact of those circumstances on the asylum-seeker. Neither proceeding resolves the underlying custody dispute. In other words, if a child cannot remain in the United States (is removed under U.S. immigration law or returned after an abduction), there is no further elaboration on the circumstances under which the child will reside upon return, short of an existing custody order being in place in the foreign country. In a Hague Abduction Convention proceeding, however, there may be more flexibility, as seen later in this article, for tailoring a return to protect a child.[27]

While asylum applicants might routinely be involved in international parental child abduction litigation in the United States, in most cases, their asylum application plays a minor role in the court's analysis to return the child, or not.[28] For example, the child's immigration status may be one of many considerations as to whether the child is settled in the United States.[29] It may also shed light on whether a child's habitual residence shifted to the United States.[30] However, any outright conflict between non-refoulement principles and the prompt return of a child under the Convention are rarer occurrences.

When these conflicts do arise, a parent is likely highlighting the child's asylum application as the key argument for not returning the child. The argument that there is a grave risk that the child would be exposed to physical or psychological harm – the same harm that caused the parent and, more importantly, the child to flee their home country and migrate to the United States – is the most common.[31] The parent may also argue that returning a child

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27 *See infra* text at notes 99 - 107.

28 *See generally* Bejarno v. Jimenez, 837 Fed. Appx. 936 (3d Cir. 2021); Vera Revelo v. Cañizalez Cedeno, 625 F. Supp. 529 (W.D. La. 2022); Karim v. Nakato, No. 21-11458-WGY, 2022 WL 1597955 (D. Mass. May 20, 2022).

29 *See Bejarno,* 837 Fed. Appx. 936.

30 Hernandez v. Erazo, No. SA-22-CV-01069, 2023 WL 2775165 (W.D. Tex. Apr. 4, 2023).

31 Salame v. Tescari, 29 F.4th 763 (6th Cir. 2022); Sanchez v. RGL, 743 F.3d 945 (5th Cir. 2014).

would not be permitted by fundamental principles of human rights under Article 20 of the Hague Abduction Convention.

A. *Asylum Applications in the United States*

Over the past decade, asylum has become an increasingly politicized issue with different administrations instituting ever-changing policies. Because a migrant must be physically present in the United States to apply for asylum status, policies have been focused on how to prevent, or not, migrants from crossing into the United States at the border.[32] Once migrants are in the United States, they have one year, short of a qualifying exception, to file an application for asylum.[33] If a migrant expresses the intent to apply for asylum, the U.S. Department of Homeland Security will conduct a credible fear process, and may detain the migrant during this process.[34] The legal burden on the migrant to prove, during this initial process, that they have a credible fear of persecution or torture in their home country is a "well founded fear of persecution."[35] After this initial screening, the migrant would then proceed to a second "merits" interview to determine whether he or she meets the eligibility criteria for asylum.[36] "Persecution" is "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[37] The Seventh Circuit Court of Appeals has defined it as "the infliction of suffering or harm, under

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32 *Remarks by President Trump at the 45th Mile of New Border Wall | Reynose-McAllen, TX* (Jan. 12, 2021), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-45th-mile-new-border-wall-reynosa-mcallen-tx/.

33 *The Affirmative Asylum Process*, U.S. Citizenship & Immigration Servs., U.S. Dep't. of Homeland Security (Sept. 13, 2023), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process.

34 *Questions and Answers: Credible Fear Screening*, U.S. Citizenship & Immigration Servs., U.S. Dep't. of Homeland Security (Sept. 12, 2023), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening.

35 INA § 101(a)(42)(A). *See also* 8 U.S.C. § 1101(a)(42)(A) .

36 *Asylum Merits Interview with USCIS: Processing After a Positive Credible Fear Determination*, U.S. Citizenship & Immigration Servs., U.S. Dep't. of Homeland Security (May 31, 2022), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-merits-interview-with-uscis-processing-after-a-positive-credible-fear-determination.

37 Matter of Acosta, 19 I&N Dec. 211, 222 (B.I.A. 1985).

government sanction, upon persons who differ in a way regarded as offensive (*e.g.,* race, religion, political opinion, etc.) in a manner condemned by civilized governments."[38] Permanent or serious injury is not required to prove that the immigrant was persecuted.[39] Persecution may be emotional or psychological.[40] Courts in the United States have found a variety of qualifying emotional or psychological persecutions over the years, including a child's trauma in observing his family injured[41] and a parent's fear that her child would be subject to female genital mutilation.[42] Other courts have found certain emotional and psychological impacts to not rise to the level of persecution, for example, a child who witnessed his father beaten by guerillas and witnessed others being executed,[43] and depression because of a spouse's forced abortion.[44]

Generally, persecution does not include harassment or discrimination.[45] Since the asylum-seeker must be unable or unwilling to avail himself or herself of the protection in the country of persecution, then the applicant must show that the government, or persons or organizations that the government is unable or unwilling to control, inflicted the persecution.[46] The persecution must be "on account of" one of five enumerated grounds: race, religion, national origin, political opinion, or membership in a particular social group.[47] Therefore, "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[48]

If the asylum-seeker adequately proves past persecution, then there is a presumption that he or she has a well-founded fear of future persecution, which can be overcome if the U.S. government can establish, by a preponderance of the evidence, that there is a

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38 Shellong v. INS, 805 F.2d 655, 662 (7th Cir. 1986).

39 Matter of O-Z- & I-Z-, 22 I&N Dec. 23, 25-26 (B.I.A. 1998).

40 Rusak v. Holder, 723 F.3d 1080 (9th Cir. 2013).

41 Hernandez-Ortiz v. Gonzalez, 496 F.3d 1042, 1045 (9th Cir. 2007).

42 Abay v. Ashcroft, 368 F.3d 634, 640-42 (6th Cir. 2004).

43 Roriguez-Ramirez v. Ashcroft, 398 F.3d 120, 124-25 (1st Cir. 2005).

44 Yi Ni v. Holder, 613 F.3d 415, 428 (4th Cir. 2010).

45 De Zea v. Holder, 761 F.3d 75 (1st Cir. 2014); Martin Martin v. Barr, 916 F.3d 1141 (8th Cir. 2019).

46 Juan Antonio v. Barr, 959 F.3d 778, 793-95 (6th Cir. 2020).

47 INS v. Elias-Zacarias, 502 U.S. 478 (1992).

48 Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018), *vacated*, 28 I&N. Dec. 307 (A.G. 2021).

"fundamental change in circumstances such that the applicant no longer has a well-founded fear" such as changed conditions in the home country.[49] If the applicant can avoid future persecution by moving to another part of their country, and, given the circumstances, it is reasonable to expect them to make such a relocation, then the presumption can be overcome.[50]

There are a few reasons why the government must deny an application for asylum without having an evidentiary hearing on a disputed fact. These mandatory denial grounds include: the applicant was involved in the persecution of others, there is reason to believe the applicant committed a serious non-political crime outside of the United States prior to arrival, the applicant is a danger to U.S. security, the applicant was convicted for a serious crime in the United States and is a danger to the community, certain terrorist activity, the applicant is firmly resettled in another country prior to arriving in the United States, if the applicant failed to apply for protection from persecution in at least one country of transit *en route* to the United States' southern border by land, a prior asylum denial short of changed circumstances, or missing the one year deadline.[51] The government may also deny asylum as a matter of discretion, even if the applicant is otherwise eligible.[52]

While the Refugee Act requires that persecution be based on a well-founded fear, the Act has a different standard when it comes to a request to withhold the removal of the applicant to their home country. This standard requires a showing of "probability of persecution."[53] Since asylum is based on circumstances in the migrant's home country, the migrant necessarily provides information to the U.S. government about their home country and their circumstances there. Under federal regulations, asylum information may not be disclosed to a third person without the asylum-seeker's consent, except in rare circumstances.[54] The rare circumstances include use of the information in defense of a legal

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49 8 C.F.R. §§ 208.13(b)(1)(i)(A), 1208.13(b)(1)(i)(A).
50 Matter of M-Z-M-R-, 26 I&N Dec. 28 (B.I.A. 2012).
51 INA § 208(b)(2)(A)(i)-(vi).
52 INA § 208(b)(2)(A)(v).
53 Stevic, 467 U.S. 407.
54 8 C.F.R. §§ 208.6(a), 1208.6(a) (2020).

action or a U.S. criminal or civil investigation.[55] Much of the evidence that an asylum applicant will share with the U.S. government in the application process could be relevant to a judge in a U.S. court reviewing whether to return an abducted child under the Hague Abduction Convention.

The issue of asylum is not just a domestic or internal issue. It is an issue of human rights and is addressed through international law. Under the 1967 Protocol, to which the United States is a Contracting State, the United States is prohibited from returning an alien to a country where "it is more likely than not that his life or freedom would be threatened on account of one of the protected grounds, provided none of the bars to protection apply."[56] U.S. compliance with this international obligation is implemented through the Immigration and Naturalization Act (INA)[57] where a migrant can seek withholding of their removal from the United States by demonstrating by a "clear probability of persecution" that their removal should be withheld.[58] This standard is higher than the evidentiary standard to be granted asylum in the first place. The withholding of removal is granted only in proceedings before an immigration judge, which is a different factfinder than an asylum officer who grants or denies an application for asylum.[59]

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55 8 C.F.R. §§ 208.6(c), 1208.6(c) (2020).

56 *Sanchez*, 761 F.3d 495, U.S. Amicus Brief at 23.

57 8 U.S.C. § 1231(b)(3).

58 *Cardoza-Fonseca*, 480 U.S. at 430.

59 *See, e.g.,* Roberto Rosas &Valeria Montalvo, *The Right to Immigrate: A Comparative Analysis of Immigration System in the United States and Mexico*, 24 Rutgers Race & L. Rev. 121, 172, n.297 (2023) ("When an immigrant turns themselves in at the border to an immigration officer and states a fear of return to their home country, immigrants are placed in credible fear proceedings. In credible fear proceedings, immigrants are interviewed by asylum officers. . . . These interviews can be conducted in the immigrant's native language by using a telephone interpreter service."). *See also The Difference Between Asylum and Withholding of Removal*, American Immigration Council (Oct. 6, 2020), https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal.

B. *The Hague Abduction Convention in the United States and Arguments Surrounding Asylum*

The United States is a Contracting State to the Hague Abduction Convention, with the primary goal of promptly returning a child under the age of sixteen after that child has been wrongfully removed from or retained outside of their habitual residence.[60] A person (or entity) who is actually exercising a right of custody over that child may petition a court in the United States where the abducted child is located to request that child's return.[61] The term "prompt" is loosely interpreted to mean six weeks because the Hague Abduction Convention includes language permitting the parent who requested the child's return to ask the courts hearing their return request to elaborate on reasons as to why the court has not decided the case after six weeks.[62]

Recent cases in the United States and in other countries have illustrated the clear conflict between asylum procedures and the Hague Abduction Convention. The conflict typically arises when asylum has been granted on behalf of the abducting parent or the child and a court is considering a request to return the child under the Hague Abduction Convention. In some cases, the asylum application is still pending at the time the court is resolving a parent's request to return their child under the Hague Abduction Convention, at times leading the respondent parent to seek a stay of the Hague Abduction Convention proceeding until the asylum request is resolved.[63] The conflict is, simply stated, that one branch of the U.S. government (executive) is prohibited from removing the asylum grantee,[64] while another branch (judicial) is required to direct the return of children with limited exceptions.[65]

This conflict is complicated by various factors including the different standards of proof in asylum and Hague Abduction Convention cases; the involvement in a Hague Abduction Convention case of a party (the petitioning parent) who is not a party to the asylum claim; the fact that evidence in the Hague Abduction

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60 Hague Abduction Convention, *supra* note 15, art. 1.

61 22 U.S.C. § 9003(b).

62 Hague Abduction Convention, *supra* note 15, art. 11.

63 Jose Junior v. Ferreira de Sousa, No. 1:21-cv-02242, 2023 WL 4725909 (N.D. Ohio July 27, 2023).

64 8 U.S.C. § 1158(c)(1)(A).

65 Hague Abduction Convention, *supra* note 15, art. 12.

Convention case is tested under cross-examination, which may not be the case in an asylum claim; and the reality that the factual findings in the Hague Abduction Convention case with respect to the child's potential exposure to grave risk will likely overlap substantially with the grounds for any grant of asylum.

For example, in 2006 in response to a question about the intersection between asylum and Hague returns, the U.S. Central Authority[66] expressed its disagreement with a California state court decision that denied the return of a child pursuant to the grave risk of harm exception based on the child's derivative status under the abducting parent's asylum grant as a result of domestic violence.[67] The United States disagreed with the decision because the standard for granting asylum is "much lower than the 13(b) standard, and because asylum hearings are not contested hearings."[68]

More recently, in preparation for the Eighth Special Commission Meeting of the Hague Conference on Private International Law on the Practical Operation of the Hague Abduction Convention, the United States' reflection on the intersection between asylum and Hague Abduction Convention issues came across as more explanatory rather than a clearly defined position on the matter. The U.S. Central Authority stated:

> This is a topic on which relatively few courts in the United States have opined. As such, the posture of the caselaw may continue to evolve. However, currently, a grant of asylum may be relevant, but is not dispositive to, a finding by the court hearing a case for return under the Hague Abduction Convention that a respondent has sufficiently proven the exceptions to return defined at Article 13(b) or Article 20. The elements to be proved, the burdens of proof, and the legal standard used when deciding whether to grant asylum in the United States differ from those used in the Hague Abduction Convention and the International Child Abduction Remedies Act (the U.S. implementing legislation for the Convention) that, if proven, allow courts the discretion to grant or deny

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66 A Central Authority is a designated office or agency that has primary responsibility for the implementation of operation of a Convention within that country. In the U.S. the Central Authority is the U.S. State Department, Office of Children's Issues.

67 *See* Hague Conference on Private International Law, *Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (2006), Response by the Delegation of the United States to Question 16 at 243, https://assets.hcch.net/upload/wop/abd_pd02efs2006.pdf.

68 *Id.*

> return under Article 13(b) or Article 20. Thus, U.S. courts have held that even if a child has been granted asylum, a court in Hague Abduction Convention proceedings must still analyze whether the evidence satisfies the exceptions to return in Articles 13(b) and/or 20. Moreover, under current U.S. caselaw, a grant of asylum does not remove a court's authority to determine whether a child should be returned under the Hague Abduction Convention, and does not prohibit the court from ordering return.[69]

Additionally, both petitioning parents and those parents defending against the child's return, may use a child's (and sometimes the parent's) immigration status as a practical impediment to resolving a Hague Abduction Convention case. Immigration status can have a direct impact on the ultimate outcome of the legal proceedings – whether a parent can be physically present for the court case, whether a child has the legal authority to return to the country where the petitioning parent is located, or whether a family can resolve a child's or family member's travel to see the child.[70]

1. *A Child's Settlement in the United States*

When a petitioning parent delays in filing a lawsuit to seek their child's return for one or more years after the wrongful removal or retention, the respondent parent may argue that the child is now settled in the United States.[71] Petitioning parents have argued that, if the child's immigration status in the United States is uncertain, the child could not be settled in their new environment. A child's immigration status is only one of many factors a court would assess in determining if the child is settled.[72] The child's inability to remain in the United States may be a factor against a finding that the child is settled in the United States, but if the

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69 *See* Hague Conference on Private International Law, *Compilation of Responses Received to the January 2023 Questionnaire on the 1980 Child Abduction Convention,* Response by the Delegation of the United States to Question 39 at 247-48, https://assets.hcch.net/docs/c269681c-778a-4453-9316-9bbbf767fb32.pdf.

70 Hague Conference on Private International Law, *Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission* ¶¶58-62 (Nov. 2011), https://assets.hcch.net/upload/wop/abduct2012pd14e.pdf.

71 Hague Abduction Convention, *supra* note 15, art. 12.

72 *Hernandez*, 2023 WL 2317792, at *8.

respondent parent clarifies that the child is not at risk of being placed in removal proceedings or returned to their home country, courts have typically given little weight to the child's lack of legal status in the United States as bearing on the ultimate outcome.[73]

2. *Parents' Shared Intentions to Migrate a Child*

A petitioning parent must also successfully argue that the child was removed from the child's habitual residence, which is a fact-intensive analysis that could include the parents' intentions as to where the child would reside, along with the child's connections to their respective countries, old and new.[74] For immigrant families who may form a plan to relocate to the United States as a unit, and then to seek asylum status once in the United States, the question may arise whether the child's habitual residence has shifted from the country where the family started to the United States. In some of these situations, one of the parents decides to abandon the family plan to move as a unit when the parents' relationship deteriorates and creates a situation where their immigration status may be part of the factual analysis in the case.[75]

3. *Harm to the Child in the Habitual Residence*

A child's asylum application often is one of many facts that inform a court as to the child's connections, or lack thereof, to the United States. In more cases, however, a respondent parent might actually use their positive outcome in their credible fear process to argue that if the U.S. government found there to be a credible fear of persecution or torture in the home country, then a court hearing a case to return the child back to that home country should likewise find that there is the likelihood of exposure to a grave risk of harm in the home country under Article 13(b) of the Hague Abduction Convention.[76]

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73 *Bejarno*, 837 Fed. Appx. 936; Hernandez v. Pena , 2016 U.S. Dist. LEXIS 195786 (E.D. La. July 20, 2016).

74 Monasky v. Taglieri, 140 S. Ct. 719 (2020).

75 Delgado v. Osuna, 837 F.3d 571, 577 (5th Cir. 2016); *Hernandez*, 2023 WL 2317792, at *8;.

76 Sanchez v. Sanchez, Case No. 1:18cv449, 2021 WL 1227133 (M.D. N.C. Mar. 31, 2021) (the respondent parent presented her credible fear screening paperwork as evidence, but that the paperwork differed in material ways from

One of the first appellate Hague Abduction Convention cases in the United States that focused on the tension between a child's asylum application and whether that child should be returned to the home country (here, Mexico) was the case of *Sanchez v. RGL*.[77] In *Sanchez,* three Mexican children were taken to the United States by their aunt and uncle. While in the United States, the children sought asylum claiming fear of their mother's boyfriend who they alleged was abusing them, was a gang member, and was a drug dealer.[78] Their mother then initiated a Hague Abduction Convention proceeding seeking the return of the children to Mexico. At the time of the initial district court decision, the children's asylum application had been rejected on procedural grounds. The U.S. Department of Health and Human Services, Office of Refugee Resettlement filed a motion seeking a stay of any ruling arguing that "the asylum applications, if re-filed, may shed light on the Court's determination of whether the children face a grave risk of harm . . . [and] may provide information relevant to the Court's determination [regarding the Article 20 human rights exception]."[79] The district court rejected the motion for a stay and granted the petition, finding that the Articles 13(b) and 20 exceptions were not established. The court noted that a determination on the asylum applications would be relevant but that it would not wait the 6-9 months it was likely to take (at that time) for such a determination.

The children appealed the district court decision, and after the filing of an appeal, the children were granted asylum. On appeal, the children argued that the asylum grant conflicted with the district court return order and should control under the last-in-time rule, since it was granted after the district court decision.[80] The children also argued that, in the alternative, the case should be remanded back to the district court considering the grant of

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her testimony at the Hague Abduction Convention trial causing the court to conclude she lacked credibility and reliability as a witness).

77 *Sanchez*, 761 F.3d 495.

78 *Id*.

79 Sanchez v. Sanchez, No. SA-12-CA-568-XR, 2012 WL 5373461, at *4 (W.D. Tex. Oct. 30, 2012), *vacated and remanded sub nom.* Sanchez v. R.G.L., 743 F.3d 945, *opinion withdrawn and superseded on reh'g*, 755 F.3d 765, *withdrawn from bound volume, opinion withdrawn and superseded on reh'g*, 761 F.3d 495 (5th Cir. 2014).

80 *Sanchez*, 761 F.3d 495.

asylum and whether the Article 13(b) or 20 exception now applies. Their mother argued that since the Hague proceedings were more thorough, that decision should control rather than the grant of asylum. The United States, in its amicus brief, argued that a grant of asylum was not dispositive of the issue but certainly relevant to the Article 13(b) and 20 exceptions.

The Fifth Circuit, addressing the inherent conflict between grants of asylum and return orders under the Hague Abduction Convention, determined that "[t]he asylum grant does not supersede [sic] 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 Security under the INA."[81] The Fifth Circuit noted that the evidentiary burden in an asylum case (preponderance of the evidence) is lower than what is required to establish an Article 13(b) and 20 exception (clear and convincing evidence).[82] However, the relevance of new evidence as part of the asylum grant to the issues present in the Hague case was sufficient to remand the case back to the district court for further proceedings to consider "all available evidence from the asylum proceedings."[83]

In *Sanchez*, ultimately the petitioner mother abandoned her request to have the children returned and allowed the children to remain in the United States, leaving the legal issue a bit in flux. However, the Fifth Circuit addressed several critical questions concerning the interaction between asylum and Hague Abduction Convention cases. First, the Fifth Circuit rejected the last-in-time rule.[84] Second, it found that an asylum grant does not trump the ability of courts to issue return orders pursuant to the Hague Abduction Convention.[85] Finally, it found that asylum claims are relevant to Hague proceedings insofar as the evidence and issues overlap but noted that the burden of proof is higher in Hague cases

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81 *Id*. at 510.

82 *Id*.

83 Judge DeMoss dissented stating that he would have affirmed the return order, noting that "the district court spent a tremendous amount of time and effort considering whether exceptions to returning the children under the Hague Convention were applicable." *Sanchez*, 761 F.3d at 511 (DeMoss, J., dissenting).

84 *Sanchez*, 761 F.3d at 509-10.

85 *Id*. at 510.

and stated that "[d]espite similarities, the asylum finding that the children have a well-founded fear of persecution does not substitute for or control a finding under Article 13(b) of the Convention about whether return 'would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'"[86]

4. *Human Rights and Asylees*

More recently, there was a second appellate Hague Abduction Convention case in the United States to address this issue. Relying heavily on *Sanchez*,[87] the Court addressed a child's derivative asylum grant and whether the child must be returned to Venezuela. While the majority reached a similar position as the Fifth Circuit, a dissenting judge in the Sixth Circuit felt differently, and elaborated on some arguments that arose in a similar Canadian Hague Abduction Convention case.

In *Salame v. Tescari*,[88] two children were abducted from Venezuela by their mother. The father filed a Hague Abduction Convention case in which the mother raised an Article 13(b) exception based on the father's alleged physical and verbal abuse, that Venezuela is a zone of war and famine, and because the Venezuelan court system would be unable to adjudicate the underlying custody dispute. The district court determined that the mother did not establish her exception and directed the return of the children back to Venezuela.[89] This case is distinguishable from *Sanchez* in that the children were derivative asylum applicants and asylum was granted prior to the district court decision.

The Sixth Circuit agreed with the Fifth Circuit in *Sanchez,* that it is the courts and not a governmental agency that has the "authority to determine [the] risks" children may face upon return, presumably to their country of habitual residence. "'Prior consideration of similar concerns in a different forum' may be relevant, but a grant of asylum does not strip the district court of its authority to make controlling findings regarding circumstances the children may face upon return."[90] The Sixth Circuit, like the Fifth before it, noted the lower evidentiary burdens in asylum cases

86 *Id*.
87 *Id*.
88 29 F.4th 763.
89 *Id*. at 766.
90 *Id*.

compared to the Article 13(b) exception in Hague cases, and further noted that interested parties may not be afforded the ability to participate in asylum proceedings.[91]

In a particularly thoughtful dissenting opinion, Judge Moore held that "a district court abuses its discretion when it declines even to consider" a grant of asylum.[92] Judge Moore's dissent was at least partially instructed by a decision from the Canadian Court of Appeals for Ontario, in *A.M.R.I. v. K.E.R.*, which held that:

> A finding of refugee status accorded by the IRB to a child affected by a Hague Convention application gives rise to a rebuttable presumption that the removal of the child from Canada will expose the child to a risk of persecution, that is, to a risk of harm. In these circumstances, Canada's non-refoulement obligations and the import of a child's refugee status must be considered under the art. 13(b) (grave risk of harm) and art. 20 (fundamental freedoms) exceptions to mandatory return under the Hague Convention.[93]

As Judge Moore noted, court opinions from "sister signatory" nations are "entitled to considerable weight."[94] Moreover, the U.S. Congress, as part of the Hague Abduction Convention's implementing legislation, directs the "uniform international interpretation of the Convention."[95]

Judge Moore's analysis in *Salame* is notable for its liberal interpretation of the Convention, at least compared to existing jurisprudence at the time. As part of her analysis into the Article 13(b) claims, Judge Moore focused on the fact that the mother would not be able to return to Venezuela for future custody proceedings because of her asylum grant and the risk that her status would be revoked. Thus, in such circumstances, children are placed in an intolerable situation when a parent must choose between losing their asylum status (also acknowledging a legitimate fear of persecution) or possibly losing custody of their children. Judge Moore, however, does not go so far as to say that the asylum grant necessitates a finding of the Article 13(b) exception based on an

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91 *See also Jose Junior*, 2023 WL 4725909.

92 *Salame*, 29 F.4th at 773.

93 A.M.R.I. v. K.E.R. [2011] ONCA 417, at ¶ 87 (Can. Ont. C.A.).

94 *Salame*, 29 F.4th at 775 (referring to Abbott v. Abbott, 560 U.S. 1, 12 (2010) (quoting El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999))).

95 22 U.S.C. § 9001(b)(3)(B).

intolerable situation, but rather that a district court must *consider* a grant of asylum when analyzing this exception.[96]

Judge Moore's comments pertaining to the Article 20 exception are even more notable considering the mother's failure to raise that argument in the district court and on appeal. However, Judge Moore concretely stated that "[r]eturning an individual who has been granted asylum to their country of nationality violates basic human rights principles and shocks the conscience."[97] Article 20 is intended for "the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."[98]

Judge Moore, however, offered her opinion that the provision found in the 1951 Convention Relating to the Status of Refugees that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his [protected status]" prohibits "loopholes through which refugees can be removed."[99] She found a basis for this in the United States' commitment to international human rights and international asylum protections which, in her view, clearly implicated the Hague return remedy.[100]

To reiterate, Judge Moore's clear and concise language on this matter did not lead her to the conclusion that the petition in *Salame* should be denied, but rather a more limited opinion that the matter should be remanded to the district court for further proceedings to consider the asylum grant.

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96 *Salame*, 29 F.4th at 777.

97 *Id.* at 778.

98 51 Fed. Reg. at 10,510 (Mar. 26, 1986). A district court in Texas recently applied this exception because a child's special educational needs would not be accommodated if the child were returned to Mexico. This exceptional decision, however, was reversed by the Fifth Circuit, which stated that the district court "essentially made an impermissible *custody* determination."

99 *Salame*, 29 F.4th at 778.

100 *Id.* United Nations High Comm'n on Refugees, 1951 Convention and Protocol Relating to the Status of Refugees, art. 33, ¶ 1, https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees; *see also* Universal Declaration of Human Rights, art. 14 (1948) ("Everyone has the right to seek and to enjoy in other countries asylum from persecution.").

III. Issues on the Horizon

A. *Ameliorative Measures to Protect Asylum Seekers upon Return*

Separately from the existing U.S. jurisprudence is the question as to how the most recent U.S. Supreme Court Hague Abduction Convention case of *Golan v. Saada*[101] may instruct a court, at least in an analysis of the child's exposure to harm in the home country to determine whether a child would be safe if returned. One of the underlying premises of an asylum application is that a person was persecuted in the country from where they came. It, therefore, as a matter of logic, seems harmful to the person to be returned to that country. However, caselaw suggests that past persecution may be ameliorated by returning a migrant asylum-seeker to another part of that country in some circumstances.[102] This concept is not uncommon in Hague Abduction Convention return cases, too. In fact, in the case of *Golan v. Saada*, the U.S. Supreme Court reinforced a judge's discretion to consider mechanisms to ameliorate harm to a child upon their return to their habitual residence.[103] This case has since led judges to consider a wide range of proposals to safely return children when a return would otherwise be harmful. One of those ways could be to return a child to a different part of the country, particularly if the harm that would befall the child is localized. Most certainly, the Supreme Court's opinion in *Golan v. Saada,* has created additional litigation, with petitioning parents more routinely arguing that if the court were to find harm in the habitual residence, the court should consider measures that would ameliorate the harm.[104] This may create an avenue for a deeper exploration into the actual persecution that might face a child if returned to the country from where they came.

U.S. judges in Hague Abduction Convention return proceedings have been readily examining these ameliorative measures since the *Golan v. Saada* opinion, and have crafted safe-harbor

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101 Golan v. Saada, 142 S. Ct. 1880 (2022).

102 Matter of M-Z-M-R-, 26 I&N Dec. 28 (BIA 2012).

103 Golan, 142 S. Ct. at 1895.

104 *See, e.g.,* Braude v. Zierler, No. 22-1985, 2023 WL 301 2269 (2d Cir. Apr. 20, 2023); Radu v. Shon, 11 F.4th 1080 (9th Cir. 2021); Johnson v. Johnson, 669 F. Supp. 3d. 1089 (D. Colo. 2023).

orders that would allow a soft landing for children upon their return, including provisions for an allegedly abusive parent to refrain from seeing the child until the home court system can resolve a safe arrangement for the child, or prohibitions on a parent consuming alcohol or driving the child after consumption.[105] The judicial discretion highlighted in the *Golan v. Saada* opinion could be applied in situations where a child asylum-seeker's persecution or harm could be ameliorated by putting in place certain provisions to allow for a safe return.

B. *Return to a "Safer" Country as a Remedy for Asylum-Seekers*

Another potential issue that may arise is whether a fear of persecution and/or exposure to harm in the home country/habitual residence may argue for a child's return to a third country. This is a rare remedy available under the Convention.[106] The Convention specifically left open the flexible alternative to return a child to a third country. This is, perhaps, most common when no parent remains in the child's habitual residence post-abduction, and so it is impractical to return a child to that country. Nonetheless, the Hague Abduction Convention's Explanatory Report states, "[t]he Convention did not accept a proposal to the effect that the return of the child should always be to the State of its habitual residence before its removal. . . . including such a provision in the Convention would have made its application so inflexible as to be useless."[107] It seems illogical that the court in a Hague Abduction Convention return proceeding would mandate a child be repatriated to some random third country when the family has no connections to that country. This flexible interpretation of the Convention, however, does give a court some options, in the right situation, to return a child to another country location that may be safer to the child, where the child may have some connections with that country or

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105 Aredes v. Aredes, Civil Action No. 1:22-cv-10666-IT, 2022 WL 2235853 (D. Mass. June 22, 2022).

106 Nigel V. Lowe et al., International Movement of Children: Law Practice and Procedure ¶ 16.5 at 288 (2004).

107 Elisa Pérez-Vera, *Explanatory Report* ¶ 110, Hague Conference on Private International Law, https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf (last visited July 5, 2023).

with a parent who is able to reside in that country.[108] With abducted children and mobile families often holding citizenship from multiple nations, or even potentially owning residences in more than one country, this could, in a rare circumstance, be a potential option for the family to return a child, when there is a grave risk or a fear of persecution in the habitual residence.[109]

C. *Asylum Application, but No Outcome at the Time of the Hague Abduction Convention Decision*

There is a tension between non-refoulement and returning an abducted child when that child's application for asylum has been granted. This tension is further exacerbated by the length of time to review an asylum application[110] in contrast with the mandatory prompt return[111] of an abducted child under the Hague Abduction Convention. In many Hague Abduction Convention return cases, the child's application for asylum remains pending,

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108 Carnelli v. Paz, Civil No. 10-3083 (SRC), 2011 WL 1983360 at *2 (D.N.J. May 19, 2011) (acknowledging the ability to return child to third country); Burdett v. Liguori, No. 303CV1736P, 2003 WL 23105201 at *1 (N.D. Tex. Dec. 23, 2003) (granting return to a third country).

109 Note that many attorneys argue that the Hague Abduction Convention fixes the forum for litigating the underlying custody matter; however, this is technically incorrect at least pursuant to U.S. law. Therefore, there have been arguments that a court should not return a child to a third country when that third country clearly has no jurisdiction to render a child-custody determination. That argument is a red herring. Each country determines its rules for child-custody jurisdiction. The United States has signed, but not yet ratified, the Hague Child Protection Convention, which could help in these circumstances when countries may have conflicts among their internal laws.

110 USCIS states that a decision will be made within 180 days unless there are exceptional circumstances *Questions and Answers: Affirmative Asylum Eligibility and Applications*, U.S. Citizenship & Immigration Servs., U.S. Dep't. of Homeland Security (Sept. 11, 2023), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-frequently-asked-questions/questions-and-answers-affirmative-asylum-eligibility-and-applications#:~:text=How%20Long%20Does%20the%20Affirmative,unless%20there%20are%20exceptional%20circumstances). However, the process can last for years. Diana Roy, *Seeking Protection: How the U.S. Asylum Process Works*, Council on Foreign Relations (May 10, 2023, 12:05 PM EST), https://www.cfr.org/backgrounder/seeking-protection-how-us-asylum-process-works).

111 Article 12 of the Hague Abduction Convention requires the return of wrongfully removed or retained children absent the exceptions. Article 1 of the Hague Abduction Convention sets the goal of a prompt return.

with some distant date for its review, or even no date at all. While not common, there have been requests by asylum-seekers to stay the Hague Abduction Convention proceeding pending the asylum application outcome.[112] In the United States, the courts have applied the *Salame v. Tescari* analysis, and denied such requests, arguing that this cuts against the mandatory obligation, under the Hague Abduction Convention, to resolve a case expeditiously.[113]

The United Kingdom Supreme Court took the opposite approach in a case that ordered a child returned to South Africa when that child, who is gay, had sought asylum in England. In the case of *G v. G,* the UK Supreme Court, having determined that a derivative asylum claim for a child is understood as the child's application for asylum, further determined that a return order pursuant to the Hague Abduction Convention cannot be enforced while an asylum request is pending[114] and that the "two Conventions are not independent of each other but rather must operate hand in hand."[115] The UK Supreme Court, however, found that the bar against enforcement of a return order does not impact the requirement that Hague Abduction Convention cases be expedited nor does it impact the trial court's ability to make findings of fact or conclusions of law.[116]

D. *Using an Alternative to the Hague Abduction Convention to Return a Child*

In some situations, a parent foregoes the remedy available under the Hague Abduction Convention and seeks recourse in the local U.S. state courts where the child is sitting post-abduction pursuant to that state's enactment of the uniform statute related to child-custody jurisdiction. If a parent, sitting in a foreign country, has, or can obtain, a clear court order from that foreign country's courts, in substantial conformity with the jurisdictional predicates of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), as enacted in each specific U.S. state, that parent

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112 Jose Junior, 2023 WL 4725909.

113 *Id*.

114 G v. G, [2021] UKSC 9 at ¶ 130.

115 *Id.* at ¶ 134.

116 *Id.* at ¶ 159 ("any bar applies only to implementation"); ¶ 160 ("the High Court should be slow to stay an application prior to any determination").

may be able to quickly seek enforcement of that foreign court order in a U.S. state court.[117] If the parent uses this remedy, the asylum applicant parent sitting in the United States has even fewer arguments available to them. There is an argument that, if the child-custody laws of the foreign country violate fundamental principles of human rights,[118] the state court need not recognize the foreign country as equal to a sister state for purposes of recognizing its custody order, but that is a narrower argument than the Article 20 argument under the Hague Abduction Convention, focused solely on child-custody laws and proceedings.

E. *Coordination Between Asylum and Hague Cases*

As mentioned above, the conflict between asylum laws and procedures and Hague Abduction Convention laws and procedures is complicated by various factors including the different standards of proof; the involvement in a Hague Abduction Convention case of a party (the petitioning parent) who is not a party to the asylum claim; the fact that evidence in the Hague Abduction Convention case is tested under cross-examination, which may not be the case in an asylum claim; and, the reality that the factual findings in the Hague Abduction Convention case with respect to the child's potential exposure to grave risk will likely overlap substantially with the grounds for any grant of asylum.

The UK Supreme Court, in *G v. G,* addressed some of these conflicts and proposed several "practical steps . . . aimed at enhancing decision making in both sets of proceedings."[119] The applicability of some of these proposals may not be workable in the United States under its current legal regime but are perhaps aspirational if the goals of both international laws are to work in tandem.

First, the UK Supreme Court suggested that in situations where an asylum claim is made in parallel to a Hague Abduction

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117 Robert G. Spector, *International Abduction of Children: Why the UCCJEA Is Usually a Better Remedy than the Abduction Convention*, 49 Fam. L.Q. 385 (2015). The UCCJEA is enacted in each U.S. state except for Massachusetts, which has enacted the predecessor act, the Uniform Child-Custody Jurisdiction Act.

118 Unif. Child Custody Jurisdiction & Enforcement Act § 105 (Unif. L. Comm'n 1997).

119 G, [2021] UKSC 9 at ¶ 165.

Convention case, the immigration authorities in charge of making asylum determinations should intervene in the Hague case.[120] Second, the court overseeing the Hague case should have a "clear line of communication" with the immigration authorities and the child should be represented in the Hague case with access to the asylum documentation.[121] Third, there should be a dedicated office within the immigration authorities that deals with the asylum cases that intersect with Hague cases.[122] Fourth, and perhaps most importantly, the evidence from the Hague case should be made available to the immigration authorities.[123] Pursuant to U.S. immigration law, asylum grants may be reversed if the basis for asylum is no longer applicable or warranted.[124] Fifth, the court should consider whether to make available normally confidential asylum documentation in the Hague case.[125] Sixth, there should be some consideration for expediting the asylum proceedings when they run parallel to Hague cases.[126] Seventh, judges with family law experience should be assigned to asylum cases that run in parallel to Hague cases.[127] Eighth, a single court should have oversight over both proceedings.[128]

The proposals set forth by the UK Supreme Court, in *G v. G,* seem almost impossible in the United States considering the procedures available and established in both asylum and Hague Abduction Convention cases. Asylum cases are not decided by the traditional U.S. federal judges that are often deciding a Hague Abduction Convention case. Federal judges that handle Hague Abduction Convention cases are also drawn from the normal pool of federal judges and do not necessarily have any experience in family law. Nor is the sharing of evidence between courts and

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120 *Id.* at ¶ 166.

121 *Id.* at ¶ 167.

122 *Id.* at ¶ 168.

123 *Id.* at ¶ 169.

124 *See* INA § 208(c)(2).

125 *G*, [2021] UKSC 9 at ¶ 170.

126 *Id.* at ¶ 174; *See* Hague Conference on Private International Law, *Conclusions and Recommendations* of the Eighth Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention. (Oct. 10–17, 2023). https://assets.hcch.net/docs/5b48f412-6979-4dc1-b4c1-782fe0d5cfa7.pdf.

127 *G*, [2021] UKSC 9 at ¶ 175.

128 *Id.* at ¶ 177.

administrative bodies something that would be likely without further legislation or administrative coordination between the judicial and executive branches of the U.S. government. The necessary coordination required to accomplish the suggestions made in *G v. G,* highlight both the tension between asylum and abduction issues and the difficulty in resolving this tension.

IV. Conclusion

With an increasing number of asylum seekers entering the United States there will undoubtedly be more child abduction cases involving asylum seekers. U.S. courts will have to determine whether to follow the preexisting jurisprudence or if a legal basis exists to create a new path forward honoring both U.S. commitments to protect asylees from a potentially harmful return and to protect children from the harmful effects of international child abduction.