

Hague Convention Article 13(b) Guide to Good Practice: Addendum to Weiner's Commentary

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In a recent issue of **Domestic Violence Report**, I described the much-anticipated *Article 13(b) Guide to Good Practicen (Guide)* that the Hague Conference on Private International Law was planning to release.¹ My comments were based on a preliminary draft of the *Guide* because only State Parties were privy to the finalized draft. The *Guide* has now been approved by State Parties and is posted on the Permanent Bureau's website.² Unfortunately, the *Guide* includes some new troubling language that may disadvantage victims of domestic violence and their children. This brief addendum describes that troubling language, explains what was done to try to fix it, and suggests the reasons why the language should not be interpreted as written.

My earlier article was critical of the *Guide*, but I indicated that the *Guide* would likely accomplish one good thing: it would acknowledge that domestic violence perpetrated by the left-behind parent against the taking parent could itself be sufficient to establish the article 13(b) defense. The article 13(b) defense allows a judge to refuse to order a child's return to the child's habitual residence if "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" (emphasis added).

Despite the vast literature about the harm that domestic violence poses to children, some courts adjudicating the article 13(b) defense in the U.S. dismiss the relevance of domestic violence when the child has not been the direct victim of the petitioner's abuse.³ In fact, the U.S. Supreme Court recently gave its imprimatur to such an interpretation in the case of **Monasky v. Taglieri**,⁴ albeit in *obiter dictum*. In commenting upon Monasky's unsuccessful attempt to invoke the

article 13(b) defense, the Supreme Court noted that while "the District Court credited Monasky's 'deeply troubl[ing]' allegations of her exposure to Taglieri's physical abuse,...the District Court found 'no evidence' that Taglieri ever abused A.M.T. [the child] or otherwise disregarded her well-being."⁵

Unfortunately, the final version of the *Guide* includes language that may reinforce the erroneous belief that domestic violence is irrelevant, or less relevant, to the defense unless there is evidence that the left-behind parent also directly abused the child. The *Guide* says, "Evidence of the existence of a situation of domestic violence, in and of itself, is . . . not sufficient to establish the existence of a grave risk to the child."⁶ In addition, a new footnote is attached to that sentence that that reads as follows:

See also Souratgar v. Fair, 720 F.3d 96 (2nd Cir 2013), 13 June 2013, United States Court of Appeals for the Second Circuit, (the US) [INCADAT Reference: HC/E/US 12401 at pp. 12 and 16], in which the taking parent's allegations of spousal abuse on the part of the left-behind parent were considered by the Court to be 'only relevant under article 13(b) if it seriously endangers the child. The article 13(b) inquiry is not whether repatriation would place the [taking parent's] safety at grave risk but whether so doing would subject the child to a grave risk of physical or psychological harm.' In that case, the Court affirmed the finding of the district court that, while there were instances of domestic abuse, 'at no time was [the child] harmed or targeted', and that 'in this case, the evidence [...] does not establish that the child faces a grave risk of physical or psychological harm upon repatriation.'⁷

The new language was unnecessary. The earlier February 2019 draft had language that better conveyed

the authors' point: the viability of the article 13(b) defense depends upon the nature, frequency, and intensity of the violence as well as the circumstances.⁸ The draft said so and then concluded, "The focus of the grave risk analysis is not limited, therefore, to whether the person opposing the return has demonstrated the existence of a situation of domestic violence." That sentence was eliminated and the new language added, despite the fact that the new wording was ripe for misinterpretation.

Several concerned people,⁹ including this author, tried to fix this language. We asked the U.S. State Department to propose a revision, either back to its previous language or to the following: "Evidence of the existence of a situation of domestic violence, in and of itself, *may not be* sufficient to establish the existence of a grave risk to the child." We also recommended that the new footnote be dropped. Unfortunately, the U.S. State Department was unreceptive; it was unwilling to "break consensus and prevent the Guide from being adopted," even though the *Guide* was not what they "would have written [them]selves."¹⁰ This author and Rhona Schutz, an Israeli academic and an expert on the Hague Convention, then submitted a petition, signed by approximately 250 family justice professionals, to the Hague Permanent Bureau and its Council on General Affairs and Policy. We requested the same revision. Unfortunately, no change was made.

Respondents' lawyers must be prepared to educate judges about why a literal reading of the new language would be erroneous. First, contrary to what the footnote implies, **Souratgar v. Fair** said the opposite: "In distinguishing the foregoing cases, we do not mean to suggest that only evidence of past parental abuse of the child, past parental threats to the child or the child's fear of a parent can establish a successful article 13(b) defense."¹¹ In fact, another panel of the Second

See HAGUE CONVENTION, next page

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HAGUE CONVENTION, from page 93

Circuit, in a case decided after **Souratgar**, recognized the defense in a case involving domestic violence but no direct abuse of the child.¹²

Second, the *Guide* clearly suggests (in a different paragraph) that the defense might be successful when the taking parent alleges that the child would be exposed to domestic violence or if the violence would significantly impair the ability of the taking parent to care for the child upon return.¹³ The *Guide* makes clear that the defense is not limited to situations in which the taking parent alleges direct physical or sexual abuse of the child. Third, the *Guide* specifically says that the application of the Convention, and the 13(b) defense in particular, is “fact-specific.”¹⁴ A litmus test for when domestic violence is relevant is inconsistent with a fact-specific approach. Fourth, even if a judge were inclined to read the new language literally, the *Guide* is advisory only.¹⁵

In the end, the problematic language — done at the eleventh hour without the benefit of public comment — seems rather fitting for a document that already failed to address the problem that led to its drafting.¹⁶

End Notes

1. Merle H. Weiner (OCT/NOV 2019). The Article 13(b) Guide to Good Practice, *Domestic Violence Report*, 25(1), 7.

2. See Guide to good practice Child abduction Convention: Part VI -Article 13(1)(b).

Available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6740>.

3. See, e.g., **Hart v. Anderson**, 2019 WL 6253248 *19-20 (S.D. Md. Nov. 22, 2019); **Gil-Leyva v. Leslie**, 780 Fed. Appx. 580, 590-91 (10th Cir. 2019).

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

5. **Id.** at 729 (“Monasky raised below an Article 13(b) defense to Taglieri’s return petition. In response, the District Court credited Monasky’s ‘deeply troubl[ing]’ allegations of her exposure to Taglieri’s physical abuse. . . . But the District Court found ‘no evidence’ that Taglieri ever abused A.M.T. or otherwise disregarded her well-being. . . . That court also followed Circuit precedent disallowing consideration of psychological harm A.M.T. might experience due to separation from her mother. . . . Monasky does not challenge those dispositions in this Court.”).

6. *Guide*, *supra* note 2, ¶ 58.

7. **Id.** at n.72.

8. Revised Draft Guide to Good Practice on Article 13(1)(b) of the 1980 Convention, Prelim. Doc. No. 7, Council on General Affairs and Policy of the Conference ¶ 56 (Mar. 2019) (hereinafter 2019 Draft Guide). Available at <https://assets.hcch.net/docs/1e6f828a-4120-47b7-83ac-a11852f77128.pdf>.

9. Lynn Hecht Schafraan, Merle Weiner, Joan Meier, Sudha Shetty, Jeffrey Edleson, and Pamela Brown sent a letter to the State Department.

10. Email from Sharla Draemel to Lynn Hecht Schafraan, Dec. 11, 2019 (on file with author).

11. **Souratgar v. Fair**, 720 F.3d 96, 105 (2d Cir. 2013). Despite the fact that the Second Circuit recognized that direct abuse of a child is not necessary to establish an article 13(b) defense, **Souratgar** is still problematic because some may cite it for the proposition that the level of violence must be exceptional or that

the parties must cohabit after the child’s return in order for a risk to exist to the taking parent and child. After all, while the 13(b) defense was not successful in **Souratgar**, the trial court had found that the petitioner committed a substantial amount of spousal abuse, including instances of physical abuse in which the petitioner “kicked, slapped, grabbed, and hit” the respondent, see **Souratgar v. Fair**, No. 12 CV 7797 (PKC), 2012 WL 6700214 *11 (S.D.N.Y. Dec. 26, 2012), some of which the child witnessed, see **id.** at 7-8, 11, and destroyed property, **id.** at 8, engaged in “shouting and offensive name-calling,” **id.** at 11, and exhibited other behavior that led the expert to claim the respondent was in “extreme danger.” **Id.** at 10. The respondent also alleged sexual abuse and coercive control, both of which the trial court had dismissed for reasons that were criticized by the Second Circuit. See **Souratgar v. Fair**, 720 F.3d at 100 n. 3 and 105 n.6. Nevertheless, all of this violence was insufficient to establish the article 13(b) defense for a number of reasons, including because the district court emphasized there was no evidence that the parties would ever cohabit again, **id.** at *11, and because the child was not directly targeted.

12. See, e.g., **Saada v. Golan**, 930 F.3d 533, 540-43 (2d Cir. 2019) (affirming trial court’s finding of a grave risk to the child from the spousal violence despite the absence of direct abuse to the child, reversing trial court’s reliance on unenforceable undertakings, and remanding to see if alternative ameliorative measures exist).

13. See *Guide*, *supra* note 2, at ¶ 57.

14. See **id.** at ¶ 55.

15. Weiner, *supra* note 1, at 21.

16. For more details about this topic, see Rhona Schutz and Merle H. Weiner (March 2020). *A mistake waiting to happen: The failure to correct the Article 13(1)(b) Guide to Good Practice*, Int’l Fam. L.J. ■



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