# WILL THE COVID-19 PANDEMIC UNDERMINE THE 1980 HAGUE ABDUCTION CONVENTION?

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## About the author

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Rosa Saladino has been working with international conventions concerning children for most of her career. Most of this experience has been with the 1980 Hague Convention on the Civil Aspects of International Child Abduction. She has worked in the Australian Central Authority and the Central Authority for England and Wales. She has also worked in the NSW Central Authority and with ISS Australia. Upon retiring from ISS Australia in 2017 Rosa has established a specialist firm dealing with International Child Abduction cases. Rosa also has extensive experience in Family Law and has been the manager of the secretariat of the Family Law Council, which advises the Australian government on Family Law matters.

**One of the earliest Australian cases raising the impact of the COVID-19 pandemic on Hague Abduction Convention[1] cases was the appeal case of *Walpole & Secretary, Department of Communities and Justice*[2] *(Walpole).***

This appeal was heard in open court on 5 March 2020. At that time in Australia we were just starting to think that COVID-19 might affect us too. By the time the judgment was delivered electronically on 25 March 2020, Australia was in full lockdown and taking the whole situation very seriously indeed. A review of the Australian and international case law in 2020 demonstrates a relatively uniform approach to the novel virus and the legal arguments that have emerged as a consequence of it.

In the Walpole judgment the Court noted the pandemic, and indicated that if they had not decided on other grounds that the children would not be required to return to New Zealand, they *"would have required further submissions concerning the effect on the children and the mother of being ordered to return to New Zealand in the present crisis."*[3]

The clear implication of these comments was that arguments about COVID-19 might be raised to ground a defence under Article 13(b) of the Hague Abduction Convention, commonly referred to as the "grave risk" defence:

1 1980 Hague Convention on the Civil Aspects of International Child Abduction.
2 *Walpole & Secretary, Department of Communities and Justice* [2020] famCAFC 65.
3 *Walpole*, above n1 [9]

> *Article 13*
>
> *Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –*
>
> *a) … or*
>
> *b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.*

For Australian cases the terms of the grave risk defence are set out in Regulation 16 (3)(b) of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth):

> *A court may refuse to make an order under subregulation (1) or (2) if a person opposing return establishes that:*
>
> *(a) … or*
>
> *(b there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;*

The comments in *Walpole* seemed an encouraging sign for taking parents however subsequent decisions both in Australia and overseas have not provided the 'get out of jail free card' for which many taking parents may have hoped.

In the international jurisprudence, the next reported judgement was an English case, *In the matter of PT (a child)*[4] which was handed down on 31 March 2020. The case concerned the return of a 12-year-old girl from the United Kingdom to Spain. The case was heard electronically.

The issue of COVID-19 was raised by the taking mother as one of the factors in her Article 13(b) defence. Mr David Rees QC (Sitting as a Deputy Judge of the High Court) outlined the argument put by the mother:

> *This risk presents itself in two ways:*
>
> *(1) The pandemic is more advanced in Spain than in the UK. As at the date of the preparation of this judgment (29 March) the official death toll stood at 1,228 in the UK and 6,528 in Spain. It could therefore be argued that PT would be at greater risk of contracting the virus in Spain than in the UK.*
>
> *(2) The increased risk of infection that is posed by international travel at this time.*[5]

The mother however did not present any evidence in support of the COVID-19 argument and therefore His Honour fell back on the evidence available on judicial notice. The matters he considered were as follows:

> *(1) From the advice provided by the UK Government, it appears that those who are considered most at risk of serious complications from coronavirus are the elderly and those with underlying health conditions. Neither PT, nor her parents, fall within this category.*
>
> *(2) PT's mother, because of her pregnancy is, however, in a group that has been advised to socially isolate themselves.*
>
> *(3) Although the course of the pandemic is clearly more advanced in Spain than in the UK, I do not have any evidence from which I can draw a conclusion that either country is any more or less safe than the other. It is clear that the pandemic is a serious public health emergency in both nations and that the number of cases in the UK is expected to continue to rise in the coming weeks. Both countries have imposed significant restrictions on their citizens in an effort to contain the pandemic. I am simply not in a possession [sic] to make any findings as to the relative likelihood of contracting the virus in each country. On the material before me, all that I can conclude is that there is a genuine risk that PT could contract the virus whether she remains in England or returns to Spain.*

4 *In the matter of PT (a child)* [2020] EWHC 834 (Fam).

5 *PT* above n4 [46].

> *(4) I accept that international travel at this time potentially carries with it a higher prospect of infection than remaining in self-isolation. However, I understand that limited international flights between the UK and Spain continue to be permitted by those governments for essential travel. From that I infer that the risk of infection posed by air travel, whilst no doubt significantly greater than normal, is not so high that either government has felt necessary to end flights altogether.*[6]

His Honour did not consider the risk sufficient to ground an Article 13(b) defence and interestingly a rapid return was ordered in case the international situation deteriorated further.[7]

The next case was an Israeli appeal *M.B.R. v. Y.RIB.*[8] Judgment in this case was delivered on 20 April 2020. The case concerned two Israeli nationals who had been living in the USA and had returned to Israel for a limited time for purposes relating to the renewal of their USA visas. The mother refused to proceed with the renewal of her USA visa and refused to return the child to the USA. At the time of the appeal the child who had been born in the USA was 16 months old.

The COVID-19 pandemic was raised as one of the matters grounding a defence under Article 13(b). In ordering the return of the child to the USA as soon as possible, the court made a ringing statement which is perhaps the equivalent of Justice Hale's *'coach and four'*[9] comment in *Re C (A Minor).*

6 *PT* above n4 [47].
7 *PT* above n4 [52(2)].
8 FC 10701-04-20 *M.B.R. v. Y.R.*
9 *Re C (A Minor) (Abduction)* [1989] 2 All ER at 471
*"The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation, if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create the psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children.*

The sentiment of the Israeli Appeal Court was expressed in perhaps less eloquent English but with equal vigor:

> *"There is extreme importance that precisely in times of great uncertainty it is heard loud and clear that minors' rights are not an anarchy and the emergency situation cannot be exploited for change status de-facto disregarding the Minor's rights, her Father's rights and ignore the provisions under International Conventions designed for ensuring minors' rights and intended to settle complex legal and urgent situations between countries."*[10]

The Israeli Appeal Court considered that there was no evidence that the risk of infection was greater in California than in Israel, and noted that the child had comprehensive medical insurance in the USA which she did not have in Israel. The child was ordered to return to the USA with her mother if she chose to return or with her father if her mother did not choose to return.

The next Australian case was an appeal, *Comar & Comar*[11] in which judgment was delivered on 24 April 2020. The case concerned the return of 3 children aged 11, 8 and 3 to Colombia. The COVID-19 pandemic had been declared between the hearing and the appeal. The Full Court therefore requested that the parties make submissions on COVID-19.

Unfortunately, the Full Court remitted the matter for rehearing and so no specific comment was made in relation to COVID-19.

The rehearing proceeded before Justice Carew and judgment[12] was handed down on 23 June 2020. At the rehearing the argument with respect to COVID-19 was put on the basis that the pandemic made it uncertain when the children might be able to be returned to Colombia, and that the children would be at grave risk of being placed in an intolerable situation as a result of the uncertainty occasioned by the inevitable delay. Her Honour did not agree, and stated:

> *I am not persuaded by the mother's arguments*

10 *M.B.R. v Y.R* above n 7 [163].
11 *Comar & Comar* [2020] FamCAFC 99.
12 *Department of Child Safety, Youth and Women & Comar and Anor* [2020] FamCA 505.

> *that delay or uncertainty can of themselves establish an exception under reg 16(3)(b) in this case. A plain reading of reg 16(3)(b) establishes that the 'intolerable situation' relates to the "return of the child under the Convention" not to the circumstances prior to the return*[13].

*Department of Communities and Justice & Leoni,*[14] was heard on 14 and 15 May 2020 and judgment delivered by Justice Harper on 24 June 2020. His Honour early in his judgment noted that

> *"…[t]he existence of the COVID-19 pandemic is notorious. However, there is no evidence of any factors which suggest risk to the welfare of the child in either Italy or Australia, apart from the ordinary vagaries of life. There is no evidence or argument that the child would be put at grave risk if she returned to Italy."*[15]

Later in the judgment his Honour considered the severity of the pandemic in Italy but noted at paragraph 134

> *"… neither party gave any evidence that returning the child to Italy would expose her to an unacceptable level of risk, by reason of where she was likely to live, which appears to be in the region of City D." He refers to the Appeal court judgment in* ***Comar***[16] *in relation to the mother's argument that the child may not be able to return to Italy for some time noting "what may apply today may be different in a week…"*[17]

*M and G*[18] dealt with an application seeking the return to Australia of a child of 4½ years who at the time of hearing on 14 and 15 May 2020, had been in the UK for 10 months. Notwithstanding the taking mother's reliance on an Article 13(b) defence, the pandemic was not raised in the judgment. The mother relied on a number of other grounds which were rejected by Mrs Justice Theis and the child was ordered to be returned to Australia.

The Irish Appeal Court case *C and G*[19] gives some guidance as to how an argument based on COVID-19 might be approached and puts the focus squarely on specific evidence and the particular child.

The case was heard by Justices Noonan, Power and Binchy and judgment was delivered by Justice Power on 5 August 2020. The judge at first instance, Justice Simons had delivered a judgement on 14 May 2020 accepting the taking mother's Article 13(b) defence based on:

i. the risk associated with international travel during the pandemic
ii. the fact that removing Jan from his primary carer would create an 'intolerable situation for him, she [the taking mother] being unable to travel due to pregnancy; and
iii. the fact that Jan had spent 18 months in Ireland created a grave risk of psychological damage if returned to Poland at this stage.[20]

The Irish Appeal Court comprehensively rejected all three bases of the defence, and ordered that the child be returned to Poland but that the order be stayed until 15 September 2020 to allow for the birth of the taking mother's new baby on 15 August 2020.

The argument as to COVID-19 is discussed at length in paragraphs 74 to 89 of the judgment. In paragraph 75 of that discussion the Appeal Court refers to the *Walpole*[21] case discussed above as authority for the court taking judicial notice of the pandemic.

In its decision the Irish Appeal Court decides that Justice Simons has conflated the risk of the child becoming infected with COVID-19 with

> *"… the probability of a grave risk of harm being visited on him should such an infection occur."*[22]

13 Ibid [73].
14 *Department of Communities and Justice & Leoni* [2020] FamCA 411.
15 Ibid [23].
16 *Comar & Comar* (2020) FLC 93-958 at [22].
17 *Department of Communities and Justice & Leoni* n13 [135].
18 *M and G* [2020] EWHC 1450 (Fam).
19 *C and G* [2020] IECA 233.
20 Ibid 14.
21 *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65.
22 *C and G* above n21 [81].

In the absence of evidence on the potential harm to the child if he became infected with COVID-19, the Appeal Court took judicial notice of an Irish government website which stated that:

> *"Very few cases have been reported in children around the world. Children also seem to get a milder infection than older people."*[23]

The Appeal Court also considered and dismissed the argument that returning a child to the country of his habitual residence would not be permitted by the government ban on unnecessary travel.[24] Similarly the lack of evidence of available fights was dismissed. The Court approved the appellant's submission that:

> *"... Simons J. reversed impermissibly, the requisite burden of proof by relying on 'an absence of evidence to prove an absence of safety whereas the correct legal test requires the respondent to show the presence of evidence to prove the presence of grave risk.' "*[25]

The Appeal Court pointed out that assessment of the risk of harm created by COVID-19 must focus on the risk to the individual child.

> *"Each child is unique and what may be a low risk of harm for one child may constitute grave risk for another."*[26]

In short if an argument based on COVID-19 is to be mounted, the respondent must have specific evidence as to the harm which will befall the particular child if they (or possibly their carers) become infected with the virus. Arguments based on travel restrictions must be grounded on specific evidence provided by the respondent.

23 *C and G* above n21 [81].
24 *"The purpose of returning such a child is related intrinsically, to his welfare and allows for issues concerning his long-term good and best interests to be determined by the courts of his habitual residence. An order for return seen in its true context, could not to my mind constitute 'unnecessary' travel." C and G* above [21] [82].
25 *C and G* above n21 [83].
26 *C and G* above n21 [88].

## Canada

Canada seems to have taken a slightly different tack at least in the early stages of the pandemic. *Onuoha v. Onuoha,*[27] is an interlocutory judgment in a Hague application seeking the return of two children to Nigeria. The matter was adjourned to a date in June 2020 through the administrative application of an order of the Chief Justice of the Ontario Court suspending the hearing of all but urgent matters before the Superior Court of Justice. The requesting father brought the matter before the court. The father's lawyer argued that the matter was urgent because *"... it is an international kidnapping. ... that adjourning to June 2, 2020 ... would greatly prejudice the father's case."*[28] The court found that because of the government travel warning to avoid non-essential travel; the risk of international travel and because an order would not be able to be implemented for months the matter was not urgent and should not proceed:

> *This is not the time to hear a motion on the return of children to another jurisdiction. Indeed, were the father to be successful, any order would likely not be capable of being implemented for weeks or even months. It would be foolhardy to expose the children to international travel in the face of the Travel Advisory, risking the restrictions and complications adverted to therein. Considering the language of the Chief's Notice, the children's "safety" and "well-being" are protected, for the time being, by remaining where they are in the care of their mother in Ontario. While the matter is very important to the parties, it is not in my view currently "urgent".*[29]

27 *Onuoha v. Onuoha,* 2020 ONSC 1815.
28 Ibid [5].
29 *Onuoha v. Onuohan* n25 [10].

## Practical difficulties created by COVID-19

In *Boyd & Sage*[30] the child had been ordered back to Australia from Scotland in proceedings under the Convention. In the Australian proceedings the taking mother, who remained in Scotland, sought urgent interim orders allowing the 7-year-old child to remain in Scotland until the end of the pandemic. The ex-tempore judgement was delivered on 5 June 2020.

The basis of the application was that the mother had tried to return and had been turned away. This was set out in the covering letter from the mother's solicitors in Melbourne:

> *"…the Central Authority has a Hague Convention Recovery Application before the Scottish Court. We note that the mother has already attempted to comply with the Order of that Court but was turned away due to the child not having a right of entry into Australia."*[31]

The matter was heard in the Australian Family Court's COVID-19 list, which had been set up to hear cases where problems arose as a result of the pandemic.

The mother's application was dismissed, and orders made requiring the child to be returned forthwith. As there were continuing proceedings in Scotland Justice Bennett who heard the matter commented:

> *"Finally, if it would assist the Scottish court to deal with the matter on the next return date before that Court, I am prepared to convene court in Australia simultaneously with that hearing and connect the two hearings by video link or telephone."*[32]

*Stefanska v. Chyzynski*[33] is a case heard in the Superior Court of Justice in Toronto Canada on 8 June 2020. The substantive case had been heard on 15 May 2020. At first instance the mother had inter alia, raised an Article 13(b) defence but had not relied on COVID-19.

Justice C Hopkins made no comment about the pandemic in the judgement and ordered the return of the two children aged 11 and 10 forthwith. The case came before Justice Hopkins again because the parents could not agree on a date for the return. The taking mother argued for a delayed return, and the requesting father for a return as soon as possible. The judge preferred to return the children in July 2020 which was as soon as possible after flights between Canada and Poland resumed.

The cases discussed above show that along with a number of overseas jurisdictions, the Family Court of Australia has taken a robust approach to arguments from the taking parent based on COVID-19. One of the difficulties has been that of presenting satisfactory evidence to the court (about health and travel) because of the volatility of the COVID-19 pandemic. In most cases it would appear that the evidence was limited to submissions and in at least one case[34] the issue was raised, and no evidence presented at all. The Full Court (Strickland, Kent & Watts JJ) in *Comar*[35] agreed with the father's submissions that,

> *"what may apply today may be different in a week".*

The main driver seems however to be the need to preserve the integrity of the Convention as expressed in the Israeli case of *M.B.R. v. Y.R:*[36]

> *"There is extreme importance that precisely in times of great uncertainty it is heard loud and clear that minors' rights are not an anarchy and the emergency situation cannot be exploited for change status de-facto disregarding the Minor's rights, her Father's rights and ignore the provisions under International Conventions designed for ensuring minors' rights and intended to settle complex legal and urgent situations between countries."*[37]

30 *Boyd & Sage* [2020] FamCA 482.
31 Ibid [4].
32 Ibid [22].
33 *Stefanska v. Chyzynski*, 2020 ONSC 3570.
34 *In the matter of PT (a child)* [47].
35 *Comar & Comar* above n 14 [22].
36 *MBR v YR* above n8.
37 *MBR v YR* above n8 [163].