In the Matter of One Infant Child, ABDOLLAH NAGHASH SOURATGAR, Petitioner,

v.

LEE JEN FAIR, Respondent.

No. 12 Civ. 7797 (PKC).

United States District Court, S.D. New York.

December 26, 2012.

MEMORANDUM AND ORDER

P. KEVIN CASTEL, District Judge.

Petitioner Abdollah Naghash Souratgar, an Iranian citizen, petitions this Court for the return of his son, Shayan, to Singapore. Shayan, who will soon be four years old, was born in Singapore and has Malaysian citizenship. Shayan's mother, respondent Lee Jen Fair, a Malaysian citizen, left Singapore with Shayan on May 20, 2012 without petitioner's knowledge or consent and in violation of a Singapore court order prohibiting either parent from taking the child out of Singapore. She traveled to the United States where neither petitioner, respondent, nor the child has any meaningful ties or connections. The petition is brought pursuant to the 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 ("Hague Convention"), and its domestic implementing legislation, the International Child Abduction Remedies Act, 42 U.S.C. Â§Â§ 11601 et seq. ("ICARA").

On October 18, 2012, shortly after the father learned that the child and respondent were living in Dutchess County, New York, he filed a petition with this Court, (Docket No. 1.) The Court held ex parte proceedings on October 18, 2012, October 22, 2012, and November 1, 2012. On November 1,[1] after hearing the testimony from the petitioner and his investigators, the Court granted the application for an order directing the U.S. Marshal to take "all necessary and lawful steps" to "remove Shayan" from his mother's custody and deliver him "into the custody of [pletitioner." (Docket No. 5.) Petitioner was ordered to surrender his passport and post a $10,000 bond. (Id.) On November 7, 2012, both parties appeared with counsel, and the Court scheduled an evidentiary hearing. The Court appointed Professor Jennifer Baum as a guardian ad litem for Shayan. (Docket No. 9.)

During the nine-day evidentiary hearing held between December 3, 2012 and December 14, 2012, the Court heard testimony from fact witnesses including: (1) petitioner; (2) respondent; (3) petitioner's counsel in the Singapore civil proceedings, Ms. Winnifred Gomez, Esq.; (4) petitioner's private investiga(or, Ms. Tamatha Stitt; (5) responden's ruothor, Ms. Mei Yoke Chew; and (6) respondent's sister, Ms. Jen Pink Lee.[2] Mr. Abed Awad provided expert testimony for the petitioner regarding Islamic family law and the Singapore legal system. Ms. Yasmeen Hassan testified as an expert for the respondent regarding the secular Singapore legal system and Sharia Law in Singapore, Malaysia, and Iran. Also, Dr. B.J. Cling, a forensic and clinical psychologist, testified on behalf of respondent on the subject of domestic violence.

Based upon the record as a whole and the Court's assessment of the credibility of the witnesses, this Court finds by a preponderance of the evidence that petitioner has established each required element under the Hague Convention: (1) the child was a habitual resident of Singapore; (2) the child's removal was in breach of petitioner's custody rights; and

(3) petitioner was exercising those rights at the time of the child's removal. The Court further finds that respondent has failed to prove by clear and convincing evidence either of her affirmative defenses (1) that the child will he subjected to a grave risk of harm if he returns to Singapore, Hague Convention, art. 13(b), or (2) that fundamental principles of the United States relating to the protection of human rights and fundamental freedoms do not permit repatriation of the child, id., art. 20.

BACKGROUND

Since 2000, petitioner has been an employment-pass holder in Singapore, where he has worked. (12/03/12 Tr. 72-73.) He first traveled to Singapore in 1985 and set up his company there in 1989. (12/03/12 Tr. 72; 12/05/12 Tr. 131)[3] The head office of the business he owns is located in Singapore and has twelve employees. He also owns a business in Iran. (12/05/12 Tr. 128-29, 132.)

Respondent has permanent resident status in Singapore. (12/10/12 Tr. 537.) In June 2008, respondent stopped working outside of the home. She previously held the position of brand manager of a jewelry company dealing in precious stones, which had a "few branches of retail stores around Singapore." (12/11/12 Tr. 601-604.) Before this, respondent worked for over four years as an assistant marketing manager at Diageo, a high-end alcoholic beverage distributor, and for approximately two years as retail manager for a cosmetic company's five or six stores. (Id.) Respondent's sister, with whom she resided in the months immediately prior to her departure to the U.S., is a U.K.-trained lawyer who serves as Vice President Regional Counsel of Citibank in Singapore. (12/12/12 Tr. 806.) Both petitioner and respondent are intelligent, sophisticated individuals. Neither is trained in law but both have displayed an ability to navigate legal systems in Singapore, Malaysia, and the United States.

Petitioner and respondent met in 1995 and maintained contract for over a decade. (12/03/12 Tr. 76.) In or around 2006, they began dating in Singapore. Respondent had practiced Christianity since childhood but, during the course of her relationship with the petitioner, converted to Islam. (12/06/12 Tr. 397-400.) In 2007, the couple married, and on January 16, 2008, they registered their marriage in Singapore. (12/06/12 Tr. 403.) Shayan was born on January 29, 2009. (Petr. Ex. C, Annex 1.) As noted, the child has Malaysian citizenship and had resided in Singapore from birth until the respondent removed the child to the United States. (12/04/12 Tr. 39-41.)

There was considerable strife in the marriage, and on April 29, 2011, while the couple still resided (together, (12/10/12 Tr. 555-56), respondent filed an application for sole custody, care, and control of the child in the High Court of the Republic of Singapore. (Petr. Ex. C, Tab A.) On Ma 16, 2011, she obtained an ex parte order from the Subordinate Courts of the Republic of Singapore prohibiting petitioner from removing the child from the jurisdiction of Singapore without respondent's consent or the court's approval. (Petr. Ex. C, Tab B.) Respondent left the marital home with the child on May 25, 2011 and moved into her sister's Singapore apartment. Shortly thereafter, petitioner was served with a copy of the Ma 16, 2011 order. (12/03/12 Tr. 83-84; 12/10/12 Tr. 554-55.) Petitioner filed a cross-application for sole custody on June 28, 2011. (Petr. Ex. C, Tab C.)

Because petitioner had not seen Shayan in over fifty days, petitioner's counsel in the Singapore civil proceedings advised petitioner that a mediation judge could help facilitate access to the child. The parties' solicitors attended a pretrial conference and requested mediation. (12/03/12 Tr. 17.) At a mediation session held on July 14, 2011, the Subordinate Court issued an order prohibiting both parties from removing the child from Singapore. (Petr. Ex. C, Tab D.) The Order also granted petitioner supervised visitation every Saturday between 3 p.m. to 5 p.m. at the Centre for Family Harmony, the costs of which were to be borne equally, (Id.)

Persons of the Muslim faith are a small minority in Singapore. By statute, divorce actions between individuals of the Muslim faith must be brought in the Singapore Sharia Courts. Administration of Muslim Law Act. Part III. Â§ 35(2)

("AMLA"). Sometime around the end of 2011, respondent brought an action for divorce in the Singapore Sharia Courts. (12/04/12 Tr. 24, 58-59; 12/11/12 Tr. 652, 655-56; Petr. Ex. J.) Respondent attended a mandatory counseling session within the Sharia Court. (12/11/12 Tr. 670.) Petitioner testified that he did not participate in the action, (12/04/12 Tr. 24-25.) Although no documentary evidence indicates the current status of the Singapore divorce action, petitioner's Singapore counsel testified that the divorce action did not proceed. (12/03/12 Tr. 43.)

The Singapore Subordinate Court continued to function on issues relating to temporary custody of the child and visitation and on February 16, 2012, after a mediation session presided over by a judge of the Singapore Subordinate Court, the court ordered that "[t]he child shall continue to be in the care of the mother pending the determination of custody, care, and control of the child by the Syariah Courts" and that "[t]he father shall have access to the child two times a week at the Centre for Family Harmony pending the outcome of the hearing of the Syariah Courts."[4] (Petr. Ex. C, Tab H.) The order states in boldfaced capital letters, which are underscored, that it was entered "BY CONSENT." (Id.) Respondent did not make an application to vacate or appeal this order. (12/11/12 Tr. 666-67.)

Petitioner last saw respondent and Shayan in Singapore on May 17, 2012. (12/03/12 Tr. 89.) On May 20, 2012, the respondent left Singapore in breach of the July 14, 2011 order. Respondent then failed to produce the child at petitioner's scheduled visit on May 24, 2012 and did not appear at a scheduled court mediation session on May 28, 2012. (12/04/12 Tr. 26-28.)

Suspecting that respondent had fled, petitioner filed a police report, and the police determined that respondent left Singapore with the child. (12/04/12 Tr. 27-29.) Petitioner obtained a court order requiring the respondent to deliver the child to the Duty Judge of the Subordinate Courts Family and Juvenile Division within seven days and surrender the child's personal documents. This order specified that "[t]he child be placed in the interim sole care and control of the petitioner "pending the determination of the action or until further Orders." (Petr. Ex. C, Tab J.) The same order further directed that respondent be restrained from removing the child from the jurisdiction without the consent of petitioner or the court. (Id.) Respondent, who was no longer in the country and likely did not receive notice of the June 5, 2012 order, did not comply and was held in contempt on June 25, 2012. (Petr. Ex. C, Tab L.)

DISCUSSION

First, the Court will outline the elements of petitioner's prima facie case under the Hague Convention and set forth its finding of facts relating thereto. Next, it will set forth the elements of respondent's affirmative defenses under Articles 13(b) and 20 of the Convention followed by its findings relevant to the affirmative defenses.

1. Petitioner's Case under the Hague Convention

The Hague Convention seeks to "secure the prompt return of children wrongfully removed to or retained in" signatory states. Hague Convention, art. 1; Blondin v. Dubois, 189 F.3d 240, 241 (2d Cir. 1999) ("Blondin II"). The United States has ratified the treaty and implemented its terms through ICARA. Singapore acceded to the treaty in May 2012.

Under the Hague Convention, a child's removal from a signatory state is wrongful when "[(a)] it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and [(b)] at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." Hague Convention, art. 3. The treaty applies to children under the age of 16. id., art. 4.

A person may exercise his rights under the Convention by filing a petition in a court "authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. Â§ 11603(h). In order to prevail, petitioner must establish by a preponderance of the evidence that "the child has been wrongfully removed or retained within the meaning of the Convention ..." 42 U.S.C. Â§ 11603(e). This requires showing that "(1) the child was habitually resident in one State and has been removed to or retained in a different State; (2) the removal or retention was in breach of the petitioner's custody rights under the law of the State of habitual residence; and (3) the petitioner was exercising those rights at the time of the removal or retention." Gitter v. Gitter, 396 F.3d 124, 130-31 (2d Cir. 2005). The Supreme Court held in Abbott v. Abbott, 130 S. Ct. 1983, 1992-93 (2010), that a statutory ne exeat right the right not to have the child removed from the jurisdiction without consent is a right of custody for purposes of the Hague Convention. A "person cannot fail to `exercise' [his] custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child." Friedrich v. Friedrich, 78 F.3d 1060, 1066 (6th Cir. 1996).

The Court finds that petitioner has established each and every element of a prima facie case under the Hague Convention. Both the United States and Singapore are signatories to the Convention. The child is under 16 years of age, was horn in Singapore and resided there until respondent removed the child to the United States. The child was a habitual resident of Singapore. Petitioner was exercising custody rights at the time of the removal, specifically his parental rights under an express order precluding either parent from removing the child from the jurisdiction of Singapore without the other's consent. (Petr. Ex. C, Tab D.) He also regularly and faithfully exercised his court-ordered visitation rights in Singapore.

2. Respondent's Affirmative Defenses

"[O]nce [petitioner] establishes that removal was wrongful, the child *must be returned* unless the [respondeni can establish one of four" narrow exceptions apply. Blondin II, 189 F.3d at 245-46 (quoting Friedrich, 78 F.3d at 1067 (emphasis added)). In this case, respondent urges that the Court should deny the petition because two such exceptions apply, Hague Convention Articles 13(b) and 20. The respondent bears the burden of proving these exceptions by clear and convincing evidence. 42 U.S.C. Â§ 11603(e), a. Article 13(b): The Grave Risk of Harm Defense

Article 13(b) of the Hague Convention provides that the signatory state "is not bound to order the return of the child" 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." Hague Convention, art. 13(h). Although the respondent bears the burden of establishing by clear and convincing evidence that the exception applies, 42 U.S.C. Â§ 11603(e)(2)(A), subsidiary facts may be proven by a preponderance of the evidence. Danaipour v. McLarey, 286 F.3d 1, 13 (1st Cir. 2002); see also In re Lozano, 809 F. Supp. 2d 197, 224 (S.D.N.Y. 2011).

The Second Circuit considered the "grave risk" exception at length in Blondin II and Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001) ("Blondin IV"). The court explained that mere showings of "inconvenience or hardship" do not amount to a "grave risk" of harm. Blondin IV, 238 F.3d at 162. Rather a "grave risk" of harm exists where "the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation." Id. The court cited with approval the Sixth Circuit's observation that a "grave risk" to the child presents itself in two situations:

> (1) where returning the child means sending him to `a zone of war, famine or disease'; or (2) `in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, *for whatever reason,* may be incapable or unwilling to give the child adequate protection.'

Id. (quoting Friedrich, 78 F.3d at 1069 (emphasis added)).

In the years since the Second Circuit's consideration of the Blondin case, several federal courts have found "a child's observation of spousal abuse is relevant to the grave-risk inquiry." E.g., Elyashiv v. Elyashiv, 353 F. Supp. 2d 394, 408 (E.D.N.Y. 2005). Indeed, "children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser." Id. (citing Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1058 (E.D. Wash. 2001) (citations omitted)). Accordingly, evidence of "[p]rior spousal abuse, though not directed at the child, can support the grave risk of harm defense." Rial v. Rijo, 10 Civ. 1578 (RM.), 2010 WL 1643995, at *2 (S.D.N.Y. Apr. 23, 2010) (citing Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000)). Still, the court need not "refuse to send a child back to [his] home country in *any* case involving allegations of abuse, on the theory that a return to the home country poses a grave risk of psychological harm." Blondin IV, 238 F.3d at 163 n. 12. Rather, that determination must be based on the "specific facts presented in [the] case." Id.

When making a grave risk determination, the court must also consider whether the child can be protected from the risk of harm "while still honoring the important treaty commitment to allow custodial determinations to be madeâ€"if at all possible â€" by the court of the child's home country." Blondin II, 189 F.3d at 248. Accordingly, in its deliberation of whether there is a grave risk of harm, the Court takes into account "any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation." Id. "In cases of serious abuse, before a [district] court may deny repatriation on the ground that a grave risk of harm exists under Article 13(b), it must examine the full range of options that might make possible the safe return of a child to the home country." Blondin IV, 238 F.3d at 163 n. 11.

For instance, in Blondin v. Dubois, 19 F. Supp. 2d 123, 129 (S.D.N.Y. 1998) ("Blondin I"), the district court concluded that there would be a grave risk of harm should the children in that case be returned to France, the country of their habitual residence. The Second Circuit, in Blondin II, remanded the case to the district court for "further consideration of the range of remedies that might allow *both* the return of the children to their home country *and* their protection from harm, pending a custody award in due course...." 189 F.3d at 249. On remand, the district court engaged in further analysis but reached the same conclusion, in part because "any return" of the children would "`almost certainly' trigger a recurrence of their traumatic stress disorder." Blondin v. Dubois, 78 F. Supp. 2d 283, 295 (S.D.N.Y. 2000) ("Blondin III"). On appeal, the Second Circuit affirmed the district court's determination that there was a grave risk of harm to the children because repatriation to the country of habitual residence created a real risk of triggering further psychological trauma, regardless of any potential mitigating arrangements. Blondin IV, 238 F.3d at 161.

In applying the standard set out in the Blondin cases, district courts in this Circuit have denied petitions to return the child where there has been evidence supporting a finding of a real risk of psychological or physical harm to the child. See, e.g., Elyashiv, 353 F. Supp. 2d at 408-09 (evidence petitioner physically abused respondent and the children and expert testimony that the children would suffer PTSD symptoms upon their return to Israel, regardless of contact with petitioner); Reyes Olguin v. Cruz Santana, No. 03 Civ. 6299, 2005 WL 67094, at *2-*4, *11-*12 (E.D.N.Y. Jan. 13, 2005) (evidence petitioner frequently beat respondent in front of the children, children told psychiatrist that petitioner hit them, and expert testimony that return of the children would exacerbate the PTSD of one child). This Court held in M.M. v. F.R., No. 11 Civ. 2355 (PKC) (S.D.N.Y. June 30, 2011), that respondent had established that repatriating the child would expose him to a grave risk of physical or psychological harm, because, among other things, the petitioner had sexually abused the child's half-sister. But, credible evidence of some level of abuse by the petitioner does not necessarily equate to establishment of the grave risk to the child in repatriation. See, e.g., Rial, 2010 WL 1643995, at *2-*3 (evidence of verbal and physical abuse toward respondent, at times in front of child); Laguna v. Avila, No. 07 Civ. 5136, 2008 WL 1986253, at *8-*9 (E.D.N.Y. May 7, 2008) (evidence of violence toward respondent, but no evidence that petitioner physically abused the child).

The focus of the inquiry is not on the relationship between the two parents or the desirability of one parent having custody. Rather, the focus should be on whether returning the child to the country from which he was removed will present a real risk of harm to the child, because, for example, it will trigger trauma to the child or the country of habitual residence lacks the means to afford reasonable protection to the child from physical or psychological harm at the

hands of a parent or third-party.

i. Domestic Violence

The Court finds that both parties have deep love for Shayan and care greatly about his wellbeing. Likewise, the guardian ad litem noted in her December 3, 2012 letter to the Court that petitioner "clearly adores his child" and respondent "is devoted to [the child]."[5] (Docket No. 33.) Respondent testified that she never saw petitioner physically abuse the child. Moreover, she never reported to the police any incident where petitioner abused the child. She never claimed in the Singapore courts that petitioner abused the child. (12/11/12 Tr. 699-700.)

Petitioner and respondent both allege instances of domestic abuse and inappropriate conduct aimed at one another. For instance, petitioner testified that respondent (1) often wielded knives in the home to threaten petitioner (12/04/12 Tr. 102-06); (2) cleared out the marital home when she left on May 25, 2011 (Resp. Ex. 3); and (3) inflicted injuries on herself and threatened suicide. (12/04/12 Tr. 79-80, 98-101.) The respondent denies each of these allegations. (12/10/12 Tr. 500 (knives); 12/10/12 Tr. 556 (furniture); 12/10/12 Tr. 500 (selfinflicted harm).) Respondent alleges that petitioner repeatedly hit, beat, kicked, and sexually abused her, offering several police reports and medical examinations. The petitioner, in turn, denies these allegations.

Based upon an assessment of credibility and available corroboration or lack thereof, the Court finds that both parties have exaggerated their claims. The Court recognizes that victims of spousal abuse often do not come forward to report instances of domestic violence for many reasons and, therefore, a lack of near-contemporaneous documentation does not necessarily render a victim's claims unbelievable. In this particular case, however, the respondent did report instances of domestic abuse to the police or to the court. But these police and medical reports do not identify the most severe acts of violence claimed before this Court.

Respondent asserts, for example, that petitioner hit and kicked her on her head and body while calling her mother on the telephone on May 31, 2008, after respondent found out she was pregnant. (12/10/12 Tr. 441-46.) The respondent filed a police report, (12/10/12 Tr. 447), which detailed that petitioner slapped her several times on her face and kicked her on her legs. (Resp. Ex. 7.) The next morning, a medical doctor examined respondent and reported that she "presented with nail marks on her right & left cheeks & bruises on the outer aspect of her right thigh." (Resp. Ex. 8.) The Court credits respondent's testimony on this point, which is generally consistent with the description in the police report. But, respondent's mother testified that during the May 31, 2008 phone call her daughter stated that petitioner was kicking her in the stomach. (12/6/12 Tr. 346.) The Court does not find this testimony credible for several reasons. When petitioner's counsel asked respondent whether she told her mother that petitioner kicked her in the stomach, respondent testified that she did not remember. (12/11/12 Tr. 706.) Respondent's May 31, 2008 police report makes no mention of kicks to the stomach. (Resp. Ex. 7.) Furthermore, the mother's testimony is not credible in other respects. She affirmed that there was no "shadow of a doubt" in her mind that on November 12, 2012 she saw petitioner, without the child, at John F. Kennedy Airport at a Turkish Airways gate, which is beyond the security clearance checkpoint, during the pendency of this case and after the U.S. Marshal had returned the child to petitioner. (12/06/12 Tr. 381-83.) Having heard petitioner's testimony that he was with his son on November 12, 2012, the Court concludes that Ms. Chew's testimony was a fabrication. On November 1, 2012, this Court ordered that petitioner surrender his passport to the U.S. Marshal and "never leave the boundaries of the Southern and Eastern Districts of New York" during this proceeding. The Court also ordered that the U.S. Marshal "notify the US Customs that Petitioner and [the child] should not be allowed to leave the United States until further order of this Court." (Docket No. 5.) Thus, the Court finds that the May 31, 2008 incident, pre-dating the birth of Shayan, was physical abuse of respondent but did not involve kicking a pregnant woman in the stomach.

Respondent also testified regarding two acts of violence occurring in the presence of the child in 2009, but she did not

report either incident. (12/10/12 Tr. 494.) She stated that in March 2009, petitioner struck her multiple times on her right shoulder while the child was breastfeeding in her arms. (12/10/12 Tr, 486-89.) She also testified that around the end of 2009 or beginning of 2010, petitioner insisted during an argument that respondent leave the marital home. When she refused, the petitioner took the child out of her arms and started to beat her on the head and back. (12/10/12 Tr. 492-93.) The Court credits respondent's testimony insofar as it establishes some form of inappropriate physical contact but concludes that the child was never in physical danger.

Respondent testified that on Ja uary 5, 2010, after petitioner threatened her, she left the house with the child in her arms and ran to a neighbor's house. She testified that petitioner pulled her into the marital home, in which he "continued to beat [her]." (12/10/12 Tr, 528-29.) Respondent lodged a police report the next day stating that the petitioner "ransacked the whole wardrobe to find [the child's] passport and birth certificate," and "out of fear" she carried the child out of the house. Respondent further reported that [petitioner] managed to stop [her] along the street and there was a scuffle" during which she "sustained scratches and redness on [her] arms where he had grabbed. [her]." (Resp. Ex. 9.) She noted, If his was not the first time her husband had hit [her." (Id.) Respondent's medical report of January 6, 2010 indicates a bruise in the shape of finger marks on her right upper-arm. (Resp. Ex, 10.) The Court finds it credible that petitioner did engage in the abuse described in the January 6 police report but that respondent's testimony at the hearing concerning beating was exaggerated and not credible.

When the respondent and child left the marital home on May 25, 2011, petitioner filed a police report, stating that his family, maid, clothes, and furniture were gone. Petitioner's report asserted that respondent attempted suicide twice and had tried to attack him with a knife and chopper a few times. (Resp. Ex. 3.) The report also stated that the respondent had nearly dislocated the child's arm. (Id.) The police called respondent and insisted that she bring the child to the station. There, an officer examined the child, (12/10/12 Tr. 558-60), and respondent made a police report stating that she voluntarily left the marital home on May 25, 2011 "in fear that [her] husband [would] turn violent against [her]" when the order she obtained was served on him. (Resp. Ex, 11.) The Court finds petitioner's account to be exaggerated and not credible.

In 2011, respondent also filed two applications to obtain Personal Protection Orders ("PPO") protecting her against abuse by petitioner. Petitioner's Singapore counsel explained that in order to obtain a PPO, a victim must make a police report and get a medical report. Then, the victim will "appear before a magistrate to swear to the complaint." If the victim "convinces the judge" that she is "in imminent danger of violence being committed ... the court will issue an expedited order on an ex-parte basis." (12/03/12 Tr. 21-22.) "Thereafter, a return date will be given for summons to be served" on the alleged aggressor. If the complaint is disputed, a counseling session is usually held and if the parties still do not agree, the matter proceeds to trial. (12/03/12 Tr. 22.) During this proceeding, the Singapore court may not consider evidence of accusations made in prior applications, which have been withdrawn. (12/03/12 Tr. 55-57.)

The respondent filed her first PPO application on August 16, 2011. The parties dispute the events leading up to the application. The police report respondent filed on August 15, 2011 explains that she met her husband at his office in order to pick up several packages belonging to her. After he placed the parcels in her car, "[petitioner] sat in the front passenger" seat while petitioner's brother "started to record [their] actions and conversations with his camera phone." (Resp. Ex. 16.) The report also stated that:

> My husband had requested for me to accept a number of Malaysia Court documents which I refused. My husband then grabbed my handphone and car keys to refrain me from leaving. As such I tried to retrieve back my handphone and car keys from him. A struggle then ensued. During the struggle my husband pulled my hands and also pushed me. I suffered some bruises and scratches on my chest and my hands.

(Id.) Respondent was issued an expedited order of protection on an ex parte basis. (Petr. Ex. 1.) Petitioner received a

petitioner; respondent represented herself.[6] (12/11/12 Tr. 620-21.) While petitioner indicated that he wished to proceed to trial, respondent obtained leave to withdraw her application. (12/05/12 Tr. 192-193; Petr. Ex. C, Tab F.)

In December 2011, respondent applied for a second PPO based on the events of November 22, 2011. In her November 22, 2011 police report, respondent explained that after a visitation session at the Centre for Family Harmony, her husband left the Centre before her because he insisted that he had an urgent meeting (usually respondent left first, and her husband left approximately ten minutes later). Respondent reported that while driving with her son and maid, petitioner "tried to stop [her] by overtaking [her] vehicle" several times "in a reckless and dangerous manner." (Resp. Ex. 18.) Respondent obtained a second expedited order on December 1, 2011. (Petr. Ex. M-2.) Petitioner again disputed respondent's allegations and this time the matter proceeded to trial. Ms. Gomez represented the petitioner and respondent represented herself at the two-day proceeding. Respondent called no witnesses other than herself. (12/11/12 Tr. 644, 646-50.) On March 12, 2012, the judge dismissed respondent's application for lack of evidence and awarded costs to petitioner. (12/11/12 Tr. 651; Petr. Ex. C, Tab G.) The expedited protective order lost effect once the case was dismissed. (12/03/12 Tr. 26.)

Respondent urges that the foregoing events punctuated an otherwise sustained pattern of coercion and control by petitioner. Respondent testified that after the marriage was registered, petitioner became more controlling, for instance, making respondent ask permission to go out and discouraging her friendships. (12/06/12 Tr. 422, 428-29.) Respondent testified that petitioner frequently criticized respondent and called her derogatory names. (12/10/12 Tr. 485, 501.) Respondent asserted that at times petitioner shouted at Shayan as well.

Respondent also testified that petitioner forced her to engage in certain sexual acts, including anal and oral intercourse, which often occurred in the marital bedroom where the child slept. (12/10/12 Tr. 511-15.) The Court does not credit respondent's testimony because respondent's SMS text messages to petitioner contradict her account and indicate that she was a willing participant. (Petr. Ex. I 1-4.)

Dr. B.J. Cling, retained by respondent, testified as an expert on domestic violence matters. She is a clinical and forensic psychologist as well as an attorney. Over the course of her career, Dr. Cling has completed two judicial clerkships, worked as an associate at three large corporate law firms in New York City, performed private forensic work, and written numerous publications in the area of forensic psychology. (12/13/12 Tr. 952-53; see also Resp. Ex. 34.) While Dr. Kling is principally a forensic psychologist, she spends a portion of her time in clinical practice, and about 20 percent of that practice involves treating patients who have suffered domestic violence. (12/13/12 Tr. 955.) Dr. Cling opined that respondent suffered from symptoms of post-traumatic stress disorder ("PTSD") and depression. (12/13/12 Tr. 1019.) Dr. Cling testified about a specific type of domestic violence termed "coercive control" or "intimate terrorism," (12/13/12 Tr. 974-75), which "has as its main focus the domination and control of the victim. (12/13/12 Tr. 981.) This type of violence is severe, frequent, and very harmful to children. (Id.) Moreover, when the victim and perpetrator separate, the characteristics of "coercive control" often escalate. (12/13/12 Tr. 989.) Here, however, the evidence does not support any conclusion that petitioner is an obsessed or jilted lover who seeks to be reunited with respondent or prevent others from being with her.

During her evaluation of respondent, Dr. Cling employed a "danger assessment tool" and determined that petitioner posed an "extreme danger" to respondent. (12/13/12 Tr. 994-95, 999.) The tool requires an assessor to ask the victim yes-or-no questions, accept the victim's answers as true, and score the questions based on the specific point values the tool assigns. (12/13/12 Tr. 997, 1005.) The factors Dr. Cling checked during her evaluation of respondent included, for example, that petitioner (l) owned a gun (which was assigned four times the weight of other factors); (2) engaged in violence toward the victim during pregnancy; (3) followed or spied on the victim; (4) threatened to kill the victim; (5) engaged in forced sex with the victim; (6) attempted to choke the victim; and that (7) the victim believed that the perpetrator had the potential to kill her. (12/13/12 Tr. 1003-07.) The Court finds that this "danger assessment tool" is a crude but useful checklist for those who may come in contact with victims of domestic violence; its predictive power in

was no credible evidence in the proceeding that petitioner owned a gun, although respondent's sister asserted that he knew how to use a gun. (12/12/12 Tr. 816.) All other factors were based upon self-reporting by respondent or her family members.

With regard to the claim that petitioner restricted respondent's access to others, the Court finds the claim not to be credible. While the parties cohabited, respondent travelled at least twice to Malaysia to visit her mother with Shayan and petitioner. (12/06/12 Tr. 367-68.) Also, in the last four months of cohabitation, respondent's sister lived with respondent and Shayan while she found housing in Singapore. (12/12/12 Tr. 808.) Further, the couple had a maid in their home throughout the period of cohabitation.

Despite the wide latitude afforded the parties at the nine-day hearing, there is no credible evidence that petitioner physically abused the child. Indeed, respondent never saw petitioner physically harm the child. (12/11/12 Tr. 699-700.) None of the police reports filed by respondent on May 31, 2008 (Resp. Ex. 7), January 6, 2010 (Resp. Ex. 9), May 25, 2011 (Resp. Ex. 11), August 15, 2011 (Resp. Ex. 16), and November 22, 2011 (Resp. Ex. 18), includes allegations of physical violence toward the child. The guardian ad litem's letter of December 3, 2012 states that the child "reported never being physically disciplined...." (Docket No. 33.)

Respondent urges that the return of the child poses a grave risk of harm because he will bear witness to petitioner's abuse of respondent. The Court finds that petitioner engaged in abusive conduct toward the respondent. This included shouting and offensive name-calling. It also included several incidents of physical abuse where the petitioner kicked, slapped, grabbed, and hit the respondent, which were near-contemporaneously reported by her to the police. The Court finds that the child was in respondent's arms when petitioner grabbed her during the January 5, 2010 incident, (Resp. Ex. 9), and that the child was in respondent's vehicle on November 22, 2011. (Resp. Ex. 18.) However, there is no credible evidence that petitioner and respondent will ever cohabit again. And, unlike in the Blondin case, there is no credible evidence that the return of this soon-to-be four-year-old child to Singapore would itself trigger a grave risk of psychological harm. There is no credible evidence, as in Blondin III, that the child himself suffers from PTSD or will have a negative reaction to being repatriated to Singapore.

Furthermore, the Court finds that Singapore is well-equipped to mitigate any risk of halm to the child pending a final custody determination. During the pendency of the Singapore custody proceedings, the Singapore Subordinate Courts acted with sensitivity to the case and needs of the parties. Indeed, when respondent alleged petitioner was violent and planned to leave the country with the child, the Singapore civil courts granted temporary physical custody, care and control to respondent and weekly supervised visitation to petitioner.

The visits took place on over thirty occasions at the Centre for Family Harmony. The Centre for Family Harmony provides a location for child visitation for "couples who are having custody issues ... while awaiting the outcome of the trial." Respondent usually observed "at least three or four" employees of the Centre for Family Harmony present during supervised visits. (12/10/12 Tr. 573-74.) Petitioner's access to the child was confined to a room where counselors observed the visits or they were video recorded. (12/03/12 Tr. 30.) "[The counselors] would speak to the parties and they would submit a report to the Family Court." (Id.) The Centre for Family Harmony kept detailed records summarizing petitioner's scheduled visits with the child. (Petr. Ex. HH.) The Centre also facilitated the parents' drop-offs and pick-ups of the child. (Id.)

Additionally, each time respondent applied for a PPO, she obtained an ex parte expedited order of protection. (Petr. Ex. M-1, M-2.) Respondent chose to dismiss her first application and not call witnesses at the trial regarding the second application. While respondent asserts she could not afford representation for the PPO proceedings, she had retained counsel for the Singapore custody, Singapore divorce and Malaysian custody proceedings.

Finally, when the petitioner made allegations of harm to the child in his May 25, 2011 police report, the police station

the credible evidence before the Court, Singapore has adequate protections in place to prevent harm to the child pending a final custody determination if respondent avails herself of them.

ii. Citizenship and Immigration Status

As noted, petitioner has an employment-pass, which allows him to reside in Singapore. He has significant ties to Singapore but also has significant ties to Iran. Petitioner's parents reside in Iran in a home owned by petitioner. Petitioner's business in Iran has seven employees. (12/05/12 Tr. 129-132.)

Respondent testified that petitioner took steps to move the child to Iran and have respondent's Malaysian citizenship revoked, which, she contends, poses a grave risk of harm to the child because the permanent resident statuses of mother and child in Singapore are contingent upon Malaysian citizenship. Malaysia prohibits citizens from holding dual-citizenship and "will revoke" the Malaysian citizenship "if the citizen is found out to have two" citizenships. (12/10/12 Tr. 522; see also 12/11/12 Tr. 681; Resp. Ex. 22.) Documentary evidence shows that actions were taken in order for respondent to obtain Iranian citizenship and travel documents. However, respondent and petitioner dispute whether respondent knew of or consented to these actions. (12/04/12 Tr. 21-23; 12/10/12 Tr. 540.)

Respondent testified that in 2009 petitioner said he "was always wanting to bring Shayan to Iran." (12/10/12 Tr. 522.) Likewise, around the middle of 2010, petitioner told her that he wanted to "relocate back to Iran" with the respondent and child and enroll the child in an Iranian military school. (12/10/12 Tr. 505.)

In March 2009, petitioner told respondent that he "wanted to apply for multiple entry visas to Malaysia" and register their marriage as well as Shayan's birth with the Iranian Consulate in Malaysia.[7] (12/10/12 Tr. 517-18.) To prepare for the visit to the Consulate, respondent obtained passport-size photos of herself as well as of the child. Respondent claims petitioner told her the photos would be submitted with the marriage registration forms. (12/10/12 Tr, 518.) At the Iranian Consulate in Malaysia, respondent signed a form and provided her thumbprint. She testified that it was her understanding that she was taking steps to "register [the] marriage and to register [the child's birth]." (12/10/12 Tr. 519-20.) The couple returned to the Iranian Consulate two weeks after their first visit. Respondent testified that on this occasion she saw a passport with a photograph of the child inside and became "worried because this was not what [petitioner] told [her]" they were doing. (12/10/12 Tr. 520.)

During the course of the marriage petitioner kept the personal documents of the respondent and child in his office safe. (12/10/12 Tr. 482.) At the end of 2009, respondent asked petitioner for the child's birth certificate and Malaysian passport in order to register him for a nursery play group. (12/10/12 Tr. 525-26.) She instead gave these documents to a friend for safekeeping, until petitioner asked for the child's documents back in January 2010. (12/10/12 Tr. 526-27.) Respondent testified that in early January 2010 petitioner said "if he can't get hold of the documents tonight, he will kill me." (12/10/12 Tr. 527.) Petitioner managed to leave the home and run toward a neighbor for help, but petitioner caught up to her and told the neighbor not to interfere.[8] (12/10/12 Tr. 528.) The next day respondent collected the documents and provided them to petitioner. (12/10/12 Tr. 536.)

Respondent testified that petitioner indicated "he want[ed] to go back to Iran to manage the Iran business." (12/10/12 Tr. 539.) The respondent's sister, Ms. Jen Pink Lee, who lived with the parties in their home between January and May 2011, testified that around March or April 2011 petitioner told her he "wanted to get divorced" and "take Shayan away to Iran because he doesn't want my sister to bring Shayan up." (12/12/12 Tr. 820-22.) Ms. Jen Pink Lee then began to look for her own apartment so that the respondent could move in with her. (12/12/12 Tr. 823-24.)

After respondent left the marital home in May 2011, respondent did not allow petitioner to visit with Shayan because she was "afraid" that petitioner would "take Shayan to Iran, because he was threatening to do that." (12/10/12 Tr. 564.)

Respondent alleges that in mid-June 2011, petitioner called respondent and told her that he had obtained an Iranian passport for her and that "he was going to the Malaysian [Embassy] in Singapore" to report respondent.[9] (12/10/12 Tr. 56].) She went to the Malaysian Embassy in Singapore to explain what had happened because she feared her Malaysian citizenship would be revoked. ()2/10/12 Tr. 565.) On July 1, 2011, Mr. Ahmad Nizam Abbas, respondent's attorney, wrote to the Malaysian National Registration Department Headquarters asking the Department to confirm whether there was information received regarding the respondent and Shayan's passports. Respondent's lawyer's letter stated that petitioner "had taken out Iranian passport for her and their child" and that petitioner had "made a complaint to the authorities of Malaysia High Commission in Singapore for action to be taken against her from this...." (Resp. Ex. 15.) The parties' attorneys in the Singapore custody proceedings exchanged several communications regarding the issuance of Iranian passports for respondent and the child. (E.g., Resp. Ex. 12; Petr. Ex. X.)

In March 2012, a letter regarding respondent's Malaysian citizenship, addressed to respondent at her mother's address in Kuala Lu pur, required respondent to "attend to this matter in the time limit of 20 days" and warned that "failure to attend in the required time limit is an offence ... and your identification card will be blacklisted." (Resp. Ex. 21 (emphases in original)) Respondent testified that she responded by giving a statement and submitting the required documents. (12/11/12 Tr. 674-77.) In a letter dated June 18, 2012, the Malaysian National Registration Department informed respondent that it had received a complaint that she held a passport released by the Iranian Embassy in Kuala Lumpur on June 3, 2011. The Department, therefore, requested that respondent contact the Department "so that immediate investigation [could take place before any action of revocation of citizenship takes place." (Resp. Ex. 22.)

Respondent urges that the child will face a grave risk of harm if the petition is granted because petitioner intends to take the child to Iran. Respondent argues that petitioner obtained Iranian passports for her and the child without her knowledge or consent, as part of petitioner's scheme to strip respondent of her Malaysian citizenship, jeopardize her permanent residency status in Singapore, and force the family to reside in Iran. In Iran, respondent would be unable to protect the child from a grave risk of harm, and might even be deprived of seeing the child again, which, she urges, would itself qualify as a grave risk of harm.

The Singapore civil courts have already afforded respondent ample opportunity during the course of the custody proceedings to prove these allegations of a plot to strip her of Malaysian citizenship and force her to live in Iran. In this proceeding, respondent has not proven that such a plot exists or, if it does, that it will likely come to fruition.[10] First, respondent's credibility regarding these accusations was undermined at trial. Respondent claimed that she could not confirm her suspicions that an Iranian passport had been issued to her until this proceeding, when she first saw a photocopy of an Iranian passport. But, the letter of her Singapore attorney, who is her agent, insisted back on July 20, 2011 that respondent "ha[d] seen the Iranian passport of herself and her son...." (Resp. Ex. 12.) In a December 2011 letter regarding Shayan's Iranian passport, respondent's attorney again maintained that "[respondent] had obtained her own Iranian passport through [petitioner's] efforts and [was] thus speaking from experience." (Petr. Ex. AA.) Second, respondent did not establish that it is more likely than not her Malaysian citizenship would be revoked. In fact, a letter dated June 18, 2012 from the Malaysian authorities still asked respondent to "contact" the Malaysian authorities "so that immediate investigation can take place before any action of revocation of citizenship takes place." (Resp. Ex. 22.) There is no evidence that Malaysian authorities would be unsympathetic to or unable to act on a claim, if true, that she had involuntarily become an Iranian citizen. Third, respondent did not offer credible evidence establishing that, if her Malaysian citizenship were revoked, she and the child could no longer reside in Singapore. Petitioner's counsel elicited on cross-examination that respondent had not looked at the Singapore government's website regarding permanent residency status requirements in "many years." (12/11/12 Tr. 701-02.) When the Court then asked respondent if she had "done any investigation or checking or inquiry or looking at websites to determine the grounds on which [she] would be able to reapply" for permanent residency status, the respondent replied that she had not. (12/11/12 Tr. 703.)

Although the Court credits that, at some point in time, petitioner would like to take the child to Iran where his mother

lives, the Court finds that respondent has failed to demonstrate that petitioner is likely to do so in violation of a Singapore court order. The Court in Singapore could place tight conditions on out-of-country travel and ensure the mother's rights of access to the child. It also could deny petitioner's request outright. The July 14, 2011 court order prohibiting both parties from taking the child out of the jurisdiction of Singapore remains in effect. (12/03/12 Tr. 20-21.) There is no credible evidence that petitioner has violated any Singapore court order in any significant respect.[11] Petitioner has lived in Singapore since 2000 and has had a business there since 1989. Respondent has failed to prove that petitioner would likely abandon his business in Singapore and risk being found in contempt of a Singapore court with the associated sanctions that could be imposed upon him.[12]

b. Article 20: The Human Rights and Fundamental Freedoms Exception

Article 20 permits the requested State to refuse the return of the child when it "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Hague Convention, art. 20.[13] The Article 20 defense must be "restrictively interpreted and applied" "on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process." Department of State, Hague International Child Abduction Convention: Text and Legal Analysis, Pub. Notice 957, 51 Fed. Reg. 10,494, 10,510 (1986). The exception is "not to be used, for example, as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed." Id. The parties do not cite and the Court cannot find any published federal case law in which the Article 20 exception was found to have been established. See Uzoh v. Uzoh, No. 11 Civ. 9124, 2012 WL 1565345, at *7 (N.D. Ill. May 2, 2012) (noting the same).

Mr. Abed Awad, retained by petitioner, and Ms. Yasmeen Hassan, retained by respondent, testified regarding the legal system in Singapore. Neither has practiced law in Singapore. Petitioner's Singapore counsel, Ms. Gomez, who testified as a fact witness, regularly practices in the family court of Singapore and testified before this Court.

Respondent argues that returning the child is not permitted by the fundamental principles of the United States because the custody determination in Singapore will be made in a Sharia Court. AMLA grants the Sharia Courts in Singapore considerable discretion in considering evidence from non-Muslims. See AMLA Â§ 42(3). Ms. Hassan testified that a woman's testimony is worth less than a man's in the Sharia Courts. (12/13/12 Tr. 907-08.) Moreover, she testified that Sharia Law applies presumptions favoring fathers and disfavoring non-Muslim parents in custody determinations. (12/13/12 Tr. 900.) These rules, respondent urges, ought shock the conscience and offend notions of due process. The Court concludes, however, that it need not reach the issue of whether the procedural and substantive rules in Sharia Courts "shock the conscience" or "offend all notions of due process" because the Court finds that respondent has failed to prove that it is more likely than not that the Sharia Court will make a final custody determination in this case.

As noted, Singapore is a predominantly non-Muslim country with about 15 percent of the population as Muslim. Singapore has a dual legal system in which civil and Sharia Courts function concurrently. AMLA sets out guidelines for the Sharia Courts in Singapore and vests them with limited jurisdiction. For instance, a Sharia Court does not have jurisdiction to consider domestic violence matters, including applications for protective orders. (12/05/12 Tr. 230, 233.) The Sharia Courts have exclusive jurisdiction in divorce actions where both spouses are Muslim or where the parties were married under the provisions of the Muslim Law. AMLA Â§ 35(2). Unless a spouse commences a divorce action in the Sharia Court, the Sharia Court is "divested of any authority or jurisdiction in [a custody] matter." (12/05/12 Tr. 236.) However, when a divorce action is pending in Sharia Court, the Sharia Court also has jurisdiction to decide ancillary matters of custody and division of property.

Still, AMLA provides procedural mechanisms for a litigant in Sharia Court to commence or continue custody proceedings in the Singapore civil courts. A civil court would be able to decide the issue of custody if both parties "consent to the commencement of the civil proceedings" or "consent to the continuation of the civil proceedings," and obtain a certificate of attendance, which is issued after a counseling session. AMLA Â§Â§ 35A(5), 35A(7). If the parties do not consent, the Sharia Court may still, in its discretion, grant an application for leave to commence or continue civil custody proceedings, AMLA Â§Â§ 35A(1), 35A(2), if "every party who will be affected by such leave has been notified of the application at least 7 days before the grant of such leave," AMLA Â§ 35A(3), and the parties "attend counseling provided by such person as the Court may appoint." AMLA Â§ 35A(6). The frequency with which these provisions are invoked in practice is unknown, in part because there is no system of recorded judgments. (12/13/12 Tr. 931.)

True, the order of February 16, 2012 of the Singapore family court contemplates that the issue of custody will he determined by the Sharia Courts. But that order was entered into after a mediation session and was "BY CONSENT" of the parties, each of whom was represented by counsel and neither of whom challenged the order. If respondent had objected to the Sharia Court acting on the custody matter, one would expect her counsel to have documented the client's desire or intent to have the Sharia Court stand down in favor of the Singapore Court. The Court rejects the respondent's after-the-fact claims that she never consented to the matter proceeding in the Sharia Court. The petitioner's expert set out plausible grounds why she may have rationally thought such a path was in her interest. (12/05/12 Tr. 231-33.) Thus, any unfairness in the process in Sharia Court is, in this case, a self-inflicted wound.

But in any event, circumstances have evolved which make it likely that the Singapore family court where respondent's original custody petition and petitioner's cross-petition remain pending will exercise jurisdiction over the custody dispute. First, the Court finds that there is no divorce action currently pending between the parties in the Sharia Courts in Singapore. (12/03/12 Tr. 43.) Second, in an affidavit dated December 7, 2012, petitioner affirmed that he "undertake [s] not to pursue any action in the Syariah Court of Singapore in relation to the custody, care and control of [his] son" and "commit[s] to the custody proceedings being continued and adjudicated upon in the Family Court of Singapore within the realm of civil proceedings." (Petr. Ex. II.) The affidavit was sworn to at the Singapore Consulate in Manhattan, and Ms. Gomez filed the document as an affidavit in the Subordinate Courts of Singapore on December 11, 2012. (Id.) Ms. Gomez testified before this Court that petitioner's undertaking, if given to the Family Court of Singapore, is binding and enforceable. (12/03/12 Tr. 62.) According to Gomez, it will require a judge to enter a court order for it to be punishable by contempt. (12/03/12 Tr. 62-63.) Petitioner has familial ties and significant business interests in Singapore. He has been substantially compliant with court orders during the pendency of the Singapore proceedings and these proceedings. Respondent has failed to prove that custody will be determined by the Sharia Courts rather than the civil courts.

Respondent also urges that there are insufficient protections against domestic violence in Singapore, and thus, Article 20 bars the child's repatriation. But the Court finds that Singapore has reasonable procedures to ensure the safety of the child during the pendency of the custody proceedings including supervised visitation. Moreover, respondent was able to obtain two expedited orders, and had the opportunity to proceed to trial on each application in order to obtain penlianent PPOs. It may be the case that respondent was barred in the second proceeding from bringing up evidence relating to the first application, which she voluntarily dismissed, due to the court's evidentiary rules. However, this does not rise to the level of shocking the conscience or offending all notions of due process.[14] Accordingly, fundamental principles of thc United States regarding the rights and freedoms of domestic violence victims do not prohibit the return of the child under Article 20.

CONCLUSIONS

Based on the findings of fact, the Court concludes that petitioner has proven by a preponderance of the evidence that (1) the child was a habitual resident of Singapore; (2) the removal of the child from Singapore violated petitioner's

custody rights under the law of Singapore; and (3) that petitioner was exercising these rights at the time of the child's removal. These are the only required elements he need prove under the Hague Convention.

The Court concludes that respondent has not proven by clear and convincing evidence her defense under Article 13(b) of the Convention, i.e. that returning the child to Singapore will subject the child to a grave risk of harm.

The Court also concludes that respondent has not proven by clear and convincing evidence her defense under Article 20 of the Convention, that returning the child is prohibited by the fundamental principles of the United States relating to the protection of human rights and fundamental freedoms.

Because petitioner has established his case under the Hague Convention and respondent has failed to prove her Article 13(h) and Article 20 defenses, the Convention and the case law cited above require that the petition be granted. The petition is granted.

STAY OF ORDER PENDING APPEAL

The Court has considered whether to stay its Order pending the hearing and determination of an appeal. For reasons that will be explained, the Court concludes that it would be an improvident exercise of discretion to stay the Order pending appeal.

In leaving Singapore with the child in violation of the Singapore court's order, the mother traveled from Singapore to Taipai and then booked a separate trip from Taipai to Los Angeles, making it more difficult to uncover her ultimate destination. Once in Los Angeles, she travelled to the community of Red Hook, New York in Dutchess County. Petitioner located the mother and child through the use of private investigators and a bit of luck in matching a social network photo of a relative of the mother featuring a nail salon in the background with photos of nail salons available on the internet. The Court ultimately ordered the U.S. Marshal Service to take the child and turn him over to the father. This, thankfully, was executed peacefully and expertly on November 2, 2012 without significant incident. Based upon the foregoing, as well as the mother's proven willingness to flaut the orders of the court in Singapore, which led to that court granting the father temporary custody of the child, this Court has ordered the child to remain in the father's temporary custody with liberal visitation by the mother in locations that are capable of being monitored. The Court has disallowed overnight visits with the mother or visits in locations that cannot be monitored because there is a significant risk that she will flee with the child and avoid detection.

Neither the father nor the mother has significant ties to the United States. The father entered the United States only after this proceeding was commenced. He is living temporarily in Kingston, New York, which is located in Ulster County, and delivers the child for visitations in Dutchess County by taxi. Unlike a parent with some roots in a community or the country, he has only improvised access to babysitters or other services. He has a business in Singapore with twelve employees to which he has not returned since arriving for this proceeding.

Disputes have arisen over the length and locations of visits. A United States District Court, even with the assistance of a pro bono guardian ad litem, is unable to offer facilities or monitoring services that would regularize supervised visits. For instance, to address concerns regarding Shayan's transition between parents at the end of scheduled visits, his father's taxi drivers had served as "objective witnesses" to the guardian ad litem. (Docket No. 34.) After the completion of the hearing, there was a dispute as to whether visitations at the maternal uncle's home permitted the child to play on the property surrounding the house and whether the guardian ad litem was authorized to alter or extend visitations hours. (Docket No. 32.) In contrast, the Centre for Family Harmony in Singapore has a proven track record in this case of successfully monitoring visits. It has a facility with amply appointed rooms where visits may take place with the assistance of vigilant nearby staff.

The treaty between the United States and Singapore contemplates the "prompt" return of the child to the country of habitual residence. See Hague Convention, art. 1. This Court will grant a stay of return until January 16, 2013 at 5 p.m. to permit a stay application to be made to the United States Court of Appeals for the Second Circuit and otherwise denies a stay pending appeal.

SO ORDERED.

[1] The Court expresses appreciation to the U.S. Marshal Service, District Executive and staff, Clerk's Office staff, court reporter, and maintenance crew who enabled the Court to conduct a hearing during the Hurricane Sandy closure.

[2] On the first day of the proceeding, respondent's counsel applied, pursuant to Rule 43(a), Fed. R. Civ. P., for leave to have several fact witnesses testify by live video feed. The Court denied respondent's application. (12/03/12 Tr. 98-103.) Respondent asked the Court to reconsider its decision by written application. Ruling from the bench, the Court again denied the application finding that "good cause in compelling circumstances" had not been demonstrated. (12/05/)2 Tr. 194-205 (citing Rule 43(a), Fed. R. Civ. P.; Matovski v. Matovski, No. 06 Civ. 4259 (PKC), 2007 WL 1575253 (S.D.N.Y. May 31, 2007i).)

[3] The Court cites to the hearing transcript and exhibits in the course of this Memorandum and Order. These citations are not intended in every case to reflect the Court's sole source of support for the proposition. In many instances, they are merely examples.

[4] Singapore court documents refer to the Sharia Courts as the "Syariah Courts." For ease, the Court will use "Sharia" for all references to such laws or courts.

[5] The Court expresses its gratitude to the fine service of the guardian ad litem. While the guardian ad litem's views regarding visits and access are most appreciated, the guardian's views on ultimate issues, such as the risk that petitioner would take the child to Iran, which are principally based on the credibility of the parties, are not entitled to significant weight.

[6] In both of the proceedings to obtain a PPO, respondent was not represented by counsel, which she testified was because of the expense. However, Mr. Ahmad Nizam Abbas of the Straits Law Practice, LLC, represented the respondent in the Singapore custody and divorce proceedings. (12/11/12 Tr. 652-53.) The respondent also retained counsel for the proceedings petitioner brought in a Malaysian Sharia Court. (12/11/12 Tr. 653.)

[7] There is no Iranian Consulate in Singapore. 12/10/12 Tr. 518.)

[8] This incident corresponds to the events described in the January 6, 2010 police and medical reports. (Resp. Ex. 9; Resp. Ex. 10.)

[9] A letter from the Iranian Consulate in Malaysia to the Malaysian Ministry of Home Affairs National Registration Department, dated September 28, 2011, indicates that respondent applied for an Iranian national card on June 21, 2011 and an Iranian passport on February 6, 2011. (Resp. Ex. 6.) The passport issued on June 3, 2011. (Id.)

[10] Respondent also argues that the laws of a third foreign jurisdiction, Malaysia, pose a grave risk of harm to the child. In June 2011 petitioner traveled to Malaysia to look for his wife and child. A letter written by respondent's Singapore counsel in July 2011 indicates respondent made a trip to Malaysia to attend to requests of the Malaysian High Commission regarding her citizenship. (Resp. Ex.)2.) When petitioner discovered the respondent and child were staying in Malaysia at the home of respondent's mother, he filed a custody application with a Malaysian Sharia Court on an ex parte basis. (Resp. Ex. 37; Resp. Ex. 38.) A Malaysian court order divided custody between the parents. Respondent then challenged the Malaysian court's jurisdiction over the matter and the court agreed. The action was dismissed. The parties and the child returned to Singapore. (12/03/12 Tr. 83-90; 12/05/12 Tr. 153-55.) Petitioner appealed the Malaysian Sharia Court's decision, but testified in this Court that he later ordered his Malaysian counsel to terminate the appeal, (12/05/12 Tr. 153-155, 192.)

Certain filings with the Malaysian Sharia Court in this action detailed that respondent, a Muslim, was practicing Christianity. (Resp. Ex. 37; Resp. Ex. 38.) Ms. Hassan testified that under most schools of Islamic thought, a Muslim does not have the right to renounce Islam and that in Malaysia apostasy is a crime punishable by death. (12/13/)2 Tr. 910.) Losing a parent would invariably qualify as a grave risk of harm. However, respondent has not proven that such risk of harm exists in this case.

[11] A December 2011 letter from respondent's Singapore counsel to Ms. Gomez says that petitioner was delinquent in returning Shayan's birth certificate to respondent, pursuant to the Singapore court's May 16, 2011 order. (Petr. Ex. AA.)

[12] See, e.g., Petr. Ex. C, Tab L (finding respondent guilty of contempt of court and imposing fines and, upon default, one week imprisonment).

[13] The Court invited the U.S. Attorney's Office for the Southern District of New York or a representative from the U.S. Department of State to comment on this issue. (Docket No. 22.) In a letter dated December 14, 2011, the U.S. Attorney's Office declined to make a substantive comment at this time "in light of the number of facts and disputes that remain unsettled" in the case. (Docket No. 31.)

[14] Article 20 is silent as to whether it applies only to the human rights and fundamental freedoms of the child, or to the parties in the case as well. See Uzoh v. Uzoh, No. i 1 Civ. 9124,2012 WL 1565345, at *7 (N.D. Ill. May 2, 2012) (respondent "presented nothing to suggest that Article 20 applies to the protection of a parent's human rights and fundamental freedoms, as opposed to those [of] the children"); Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996) ("The Court has focused primarily on Respondent's rights even thouEh it is not clear that the Hague Convention's focus under Article 20 is on the parents' rights as opposed to the child's rights."). The Court concludes that Article 20 is broad enough to encompass the rights of the parties but only insofar as they relate to the exercise of custody rights of the child.

720 F.3d 96 (2013)

Abdollah Naghash SOURATGAR, Petitioner-Appellee,

v.

Lee Jen FAIR, Respondent-Appellant.

Docket No. 12-5088.

United States Court of Appeals, Second Circuit.

Argued: March 13, 2013.
Decided: June 13, 2013.

99 *99 Robert D. Arenstein, Law Offices of Robert D. Arenstein, New York, NY, for Petitioner-Appellee.

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Before: WALKER, WESLEY and DRONEY, Circuit Judges.

JOHN M. WALKER, JR., Circuit Judge:

Lee Jen Fair appeals the grant of a petition brought by her husband Abdollah Naghash Souratgar for repatriation of their
100 son from New York to Singapore. In *100 May 2012, Lee removed the boy to Dutchess County, New York, in direct

101 *Judge*) granted Souratgar's petition pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("Convention"), Oct. 25, 1980, T.I.A.S. No. 670, 1343 U.N.T.S. 89, and its implementing statute, the International Child Abduction Remedies Act, 42 U.S.C. Â§Â§ 11601-10. *Souratgar v. Lee Jen Fair*, No. 12 CV 7797 (PKC), 2012 WL 6700214 (S.D.N.Y. Dec. 26, 2012).

The principal issue on appeal is whether Lee's affirmative defenses to repatriation should have prevailed in the district court. We find the district court correctly applied the Convention and affirm its order of repatriation.

I. Background

The boy at the center of this case, now four-year-old Shayan, was born in Singapore in January 2009 to Lee and Souratgar, who are both residents of that country. Souratgar is an Iranian national who has owned a business in Singapore since 1989. Lee is a Malaysian national who worked as an airline attendant, saleswoman, and retail manager in Singapore. She converted to Islam, Souratgar's faith, just prior to their marriage in Singapore in 2007. Shayan is a citizen of Malaysia with a Malaysian passport[1].

The parties' marital relationship has been stormy. At the district court hearing, they traded accusations and denials of domestic abuse. Souratgar accused Lee, among other things, of biting him, repeatedly threatening him with a knife and chopper, having suicidal tendencies, and inflicting injuries on herself. Lee asserted in her testimony more serious allegations â€" that Souratgar repeatedly slapped, beat, shook, and kicked her, and that he forced her to perform sex acts against her will. The district court carefully checked these assertions against the various police reports, medical records, and legal papers entered into evidence and, while it could not verify the most severe claims of abuse and found both parties' testimony to be incredible in certain instances, it did credit the accounts it could corroborate.[2] The district court found spousal abuse by Souratgar, including "shouting and offensive name-calling," and several incidents of physical abuse in which he "kicked, slapped, grabbed, and hit" Lee.[3] *Souratgar,* 2012 WL 6700214, at *11.

The district court found no credible evidence of any harm directed against the *101 child. Both parties, despite their acrimonious contest over his custody, acknowledge the other's love for Shayan, and it is not disputed that the boy dearly loves both of his parents.

The district court also found Souratgar and Lee to be intelligent, sophisticated individuals who were able to make use of legal proceedings in Singapore, Malaysia, and the United States. In April 2011, when Shayan was two, Lee filed an *ex parte* application in the Singapore High Court for sole custody. She cited concern that Souratgar would take Shayan from the country and cut her off from the boy. On May 16, the Subordinate Court of Singapore issued an *ex parte* order directing Souratgar to hand over Shayan's passports and personal documents to Lee and barring Souratgar from removing the child from Singapore without court approval and Lee's knowledge or consent. Souratgar complied with the order, denied Lee's charges, and cross-applied for sole custody. While the custody proceedings were pending in Singapore, Lee moved out of the marital home with Shayan and refused to disclose their whereabouts to Souratgar. He eventually found them in Malaysia, where Lee denied him access to the boy. Souratgar then filed a custody application in the Syariah Court of Malaysia, which granted joint custody to the couple in early July. Thereafter, Lee succeeded in obtaining a dismissal of that order from the Malaysian Syariah Court for lack of jurisdiction.

After Lee and Shayan returned to Singapore, the custody proceedings in Singapore's Subordinate Court resumed. Following a mediation session on July 14, 2011, the Subordinate Court barred either parent from removing Shayan from Singapore without the other's consent and ordered interim supervised visitation for Souratgar of two hours per week at Singapore's Centre for Family Harmony. Following another mediation session on February 16, 2012, both parties agreed to a consent order by the Subordinate Court to have custody decided by the Syariah Court of Singapore.[4] In the meantime, Shayan remained in Lee's care, while Souratgar's visitation time was doubled.

102 On May 20, 2012, Lee removed Shayan from Singapore, in violation of the Singapore Subordinate Court's order. Souratgar, through a private investigator, eventually located Lee and Shayan in Dutchess County, and on October 18, filed an *ex parte* application in the district court under the Convention for Shayan's return to Singapore.

After *ex parte* hearings, the district court ordered Souratgar to surrender his passport and post bond, and transferred custody of the child to Souratgar. The district court then appointed a guardian *ad litem* to represent Shayan's interests and ordered Souratgar to make the child available to Lee for five sessions of visitation per week, with not less than three hours per session, during the pendency of the proceedings. The district court heard testimony from nine witnesses over a nine-day evidentiary hearing, and on December 26, granted Souratgar's petition. This petition was temporarily stayed pending emergency appeal. We stayed enforcement of the repatriation order, imposed an expedited briefing schedule, and granted leave for the filing of amicus briefs.

II. Discussion

A. The Framework of the Hague Convention

The Hague Convention, a multilateral treaty, is designed to "protect *102 children internationally from the harmful effects of their wrongful removal [by] establish[ing] procedures to ensure their prompt return to the State of their habitual residence," *Abbott v. Abbott*, 560 U.S. 1, 130 S.Ct. 1983, 2002 n. 6, 176 L.Ed.2d 789 (2010) (quotation marks and emphasis omitted), so that the "rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States," *Chafin v. Chafin*, ___ U.S. ___, 133 S.Ct. 1017, 1021, 185 L.Ed.2d 1 (2013) (quotation marks omitted). The Convention's remedy of repatriation is designed to "preserve the status quo" in the child's country of habitual residence and "deter parents from crossing international boundaries in search of a more sympathetic court." *Blondin v. Dubois (Blondin II)*, 189 F.3d 240, 246 (2d Cir.1999) (quotation marks omitted).

The removal of a child under the Convention is deemed "wrongful" when "it is in breach of rights of custody attributed to a person ... under the law of the State in which the child was habitually resident immediately before the removal." *Abbott*, 130 S.Ct. at 1989 (quotation marks omitted). Under the Convention, when a parent wrongfully removes a child from one contracting state which is the child's country of habitual residence to another contracting state, the other parent may initiate a proceeding to repatriate the child to the first state.[5] In the United States, the petitioning party bears the burden of proving that the child was wrongfully removed. 42 U.S.C. Â§ 11603(e)(1)(A). Once the petitioner "establishes that removal was wrongful, the child *must be returned* unless the [respondent] can establish one of four defenses." *Blondin II*, 189 F.3d at 245 (quotation marks omitted); *see also* 42 U.S.C. Â§ 11601(a)(4). The decision concerning repatriation shall "not be taken to be a determination on the merits of any custody issue." *Blondin II*, 189 F.3d at 245 (quotation marks omitted); *Mota v. Castillo*, 692 F.3d 108, 112 (2d Cir.2012) ("[T]he Convention's focus is simply upon whether a child should be returned to her country of habitual residence for custody proceedings.").

The parties do not dispute either that Singapore is the country of Shayan's habitual residence or that his removal from Singapore was wrongful under the Convention. The issue on appeal is whether the two affirmative defenses that Lee raised under Articles 13(b) and 20 of the Convention preclude repatriation. Under Article 13(b),

> the judicial or administrative authority of the requested State is not bound to order the return of the child if [the party opposing repatriation] establishes that ... 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.

1343 U.N.T.S. at 101. Under Article 20, repatriation also "may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." *Id.*

103 *103 The respondent parent opposing the return of the child has the burden of establishing "by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies." 42 U.S.C. Â§ 11603(e)(2)(A). Subsidiary facts may be proven by a preponderance of the evidence. *See In re Lozano,* 809 F.Supp.2d 197, 224 (S.D.N.Y. 2011). The district court is vested with considerable discretion under the Convention. Indeed, "even where the grounds for one of these `narrow' exceptions have been established, the district court is not necessarily bound to allow the child to remain with the abducting parent." *Blondin II,* 189 F.3d at 246 n. 4.

B. Standard of Review

We review the district court's interpretation of the Convention *de novo* and its factual determinations for clear error. *Blondin v. Dubois (Blondin IV),* 238 F.3d 153, 158 (2d Cir.2001). Our "review under the `clearly erroneous' standard is significantly deferential." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,* 508 U.S. 602, 623, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). We must accept the trial court's findings unless we have a "definite and firm conviction that a mistake has been committed." *Id.* (quotation marks omitted).

C. Lee's Article 13(b) defense

Lee contends that returning Shayan to Singapore would expose him to "a grave risk" of "physical or psychological harm" or "otherwise place him in an intolerable situation" and that the district court's finding to the contrary was error. The harms he could face upon return, she asserts, are (1) exposure to spousal abuse; (2) direct abuse from his father; or (3) the loss of his mother. After carefully reviewing the record, we find that Lee's arguments are permeated with conjecture and speculation and that there was no error in the district court's determination that Lee had failed to meet her burden to establish the Article 13(b) defense.

Under Article 13(b), a grave risk of harm from repatriation arises in two situations: "(1) where returning the child means sending him to a zone of war, famine, or disease; or (2) in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, *for whatever reason,* may be incapable or unwilling to give the child adequate protection." *Blondin IV,* 238 F.3d at 162 (quotation marks omitted). The potential harm to the child must be severe, and the "[t]he level of risk and danger required to trigger this exception has consistently been held to be very high." *Norden-Powers v. Beveridge,* 125 F.Supp.2d 634, 640 (E.D.N.Y. 2000) (citing cases). The grave risk involves not only the magnitude of the potential harm but also the probability that the harm will materialize. *Van De Sande v. Van De Sande,* 431 F.3d 567, 570 (7th Cir.2005).

This "`grave risk' exception is to be interpreted narrowly, lest it swallow the rule." *Simcox v. Simcox,* 511 F.3d 594, 604 (6th Cir.2007); *Blondin II,* 189 F.3d at 246 (warning that permissive invocation of the affirmative defenses "would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration" (quotation marks and citation omitted)).

1. Risk from exposure to spousal abuse

Many cases for relief under the Convention arise from a backdrop of domestic strife. Spousal abuse, however, is only
104 relevant under Article 13(b) if it seriously *104 endangers the child. The Article 13(b) inquiry is not whether repatriation would place the respondent parent's safety at grave risk, but whether so doing would subject the child to a grave risk of physical or psychological harm. *Charalambous v. Charalambous,* 627 F.3d 462, 468 (1st Cir. 2010) (per curiam).

The exception to repatriation has been found where the petitioner showed a "sustained pattern of physical abuse and/or a propensity for violent abuse" that presented an intolerably grave risk to the child. *Laguna v. Avila*, No. 07-CV-5136 (ENV), 2008 WL 1986253, at *8 (E.D.N.Y. May 7, 2008). Evidence of "[p]rior spousal abuse, though not directed at the child, can support the grave risk of harm defense," *Rial v. Rijo*, No. 1:10-cv-01578-RJH, 2010 WL 1643995, at *2 (S.D.N.Y. Apr. 23, 2010), as could a showing of the child's exposure to such abuse, *Elyashiv v. Elyashiv*, 353 F.Supp.2d 394, 408 (E.D.N.Y.2005). Evidence of this kind, however, is not dispositive in these fact-intensive cases.

Sporadic or isolated incidents of physical discipline directed at the child, or some limited incidents aimed at persons other than the child, even if witnessed by the child, have not been found to constitute a grave risk. *See In re Filipczak*, 838 F.Supp.2d 174, 180 (S.D.N.Y.2011) (granting repatriation petition even though the child had witnessed one incident of spousal abuse as a two-year-old); *Rial*, 2010 WL 1643995, at *2-3 (ordering return of child despite evidence that petitioner was verbally and sometimes physically abusive to respondent); *Lachhman v. Lachhman*, No. 08-CV-04363 (CPS), 2008 WL 5054198, at *9 (E.D.N.Y. Nov. 21, 2008) (concluding that evidence of petitioner's previous arrest, but not conviction, on domestic abuse charges was insufficient to establish grave risk where there was no evidence that petitioner had ever harmed child). In this case, the district court found that, while Lee was subjected to domestic abuse on certain occasions â€" albeit less than she claimed, at no time was Shayan harmed or targeted.

We have held that Article 13(b) relief could be granted if repatriation posed a grave risk of causing unavoidable psychological harm to the child. *See Blondin IV*, 238 F.3d at 160-61 (affirming denial of petition to repatriate after an expert psychologist opined that returning the boy and girl to France, where they had been abused by their father, would likely trigger recurrence of PTSD, and that no arrangement could mitigate this risk). The holding in *Blondin IV* depended on the fact that due to the nature of the potential harm at issue â€" recurrence of PTSD that would occur as soon as the children entered France â€" there was nothing the courts could do to prevent it. In this case, there is nothing in the record beyond speculation that Shayan would suffer unavoidable psychological harm if returned to Singapore. Neither party nor the guardian *ad litem* requested a psychological evaluation of the boy, and the guardian *ad litem* reported, after observing Shayan's interactions with both parents and interviewing him separately, that the boy appeared to be an active and happy child, who seemed distressed about the difficulties between his parents. Shayan expressed unqualified love for both parents and indicated that he was never physically disciplined and never saw or heard either parent hit the other or try to hurt the other parent. These observations are consistent with the reports to the Singapore Subordinate Court by Singapore's Centre for Family Harmony, which supervised and reported on Souratgar's visits with
105 the boy. In contrast, the girl in *Blondin IV* *105 had herself been abused and expressed fear of her father.

The circuit court cases affirming denial of repatriation cited by Lee are distinguishable in that the petitioning parent had actually abused, threatened to abuse, or inspired fear in the children in question. *See Khan v. Fatima*, 680 F.3d 781, 787 (7th Cir.2012) (daughter told social worker she was "scared" of her father); *Simcox*, 511 F.3d at 608 (father subjected children to "repeated beatings, hair pulling, ear pulling, and belt-whipping" and psychological abuse); *Van De Sande*, 431 F.3d at 570 (father spanked daughter and threatened to kill wife and children); *Walsh v. Walsh*, 221 F.3d 204, 221-22 (1st Cir.2000) (one child diagnosed with PTSD as a result of physical abuse and father repeatedly violated court orders); *Blondin II*, 189 F.3d at 243 (father tied cord around daughter's neck and threatened to kill mother and daughter); *see also Baran v. Beaty*, 526 F.3d 1340, 1346 (11th Cir.2008) (despite the absence of any evidence of past abuse of the child by the father, the father was found to be frequently drunk, emotionally unstable, and to have threatened the child and verbally and physically abused the mother in the child's presence); *Danaipour v. McLarey*, 286 F.3d 1, 5-8 (1st Cir. 2002) (father may have sexually abused the daughter). 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. We only hold that in this case, the evidence, which does not match the showing in those cases, does not establish that the child faces a grave risk of physical or psychological harm upon repatriation.

Lee contends that the district court erred in discounting the likelihood that Shayan would be exposed to renewed domestic strife and suffer grievous psychological harm upon his return to Singapore. She also faults the district court for refusing to credit expert testimony characterizing Souratgar as having a coercive and controlling personality type with a

106 B.J. Cling, who described abusive spouses of the "coercive control" type and of the "situational" type and placed Souratgar in the former category. The coercive control type is said to demand domination and control and grows more dangerous upon separation from the victim. On this basis, Dr. Cling concluded that Souratgar still poses an "extreme danger" to Lee even though they had been estranged for more than a year. Dr. Cling's assessment of Souratgar was based entirely on Lee's answers to a survey, which the district court found to contain inaccuracies. The district court therefore discredited Dr. Cling's conclusions. Our review of the record yields no basis for disagreement with the district court's finding.[6] For us to hold evidence of spousal conflict alone, without a clear *106 and convincing showing of grave risk of harm to the child, to be sufficient to decline repatriation, would unduly broaden the Article 13(b) defense and undermine the central premise of the Convention: that wrongfully removed children be repatriated so that questions over their custody can be decided by courts in the country where they habitually reside. *Simcox*, 511 F.3d 594, at 604. Our holding today is not that abuse of the kind described by Lee can never entitle a respondent to an Article 13(b) defense; rather it depends on the district court's finding that Shayan would not be in danger of being exposed to a grave risk of physical or psychological harm and that the Singapore court system has demonstrated its ability to adjudicate the dispute over his custody.

2. Risk of abuse by the father

Lee also contends that Shayan faces a direct risk of harm from his father, who, having been abusive to Lee, is also likely to turn on Shayan. In support of this assertion, *amici* cite the description of the "coercive control" type in the social science literature that draws certain correlations between perpetrators of spousal abuse and child abuse. However, given the problems with Dr. Cling's methodology in type-casting Souratgar, the lack of any indicia of ill-will on the part of Souratgar toward Shayan, and contrary credited evidence of a loving father-son relationship, there is no clear and convincing showing in the record that the boy faces a grave risk of harm from his father.

3. "Grave risk" arising from loss of the mother

Lee also posits various scenarios in which the boy would be deprived of his mother post-repatriation. She claims Souratgar may (a) resort to Syariah court proceedings in Singapore or Malaysia to win custody outright; (b) abscond with Shayan to Iran; or (c) expose her to the charge of apostasy (leaving the Muslim faith), a religious crime punishable by death in her home country of Malaysia. The district court dismissed these claims as lacking factual support.

As an initial matter, we cannot conclude that the prospect that one parent may lose custody of the child, post-repatriation, necessarily constitutes a grave risk to the child under the Convention. Since the Convention defers the determination of custody to courts in the country where the child habitually resides, it is quite conceivable that in some cases one or the other parent may lose legal custody after repatriation and be deprived of access to the child. Thus, the possible loss of access by a parent to the child does not constitute a grave risk of harm *per se* for Article 13(b) purposes. *See Charalambous*, 627 F.3d at 469 ("[T]he impact of any loss of contact with the Mother is something that must be resolved by the courts of the Children's habitual residence." (quotation marks omitted)). But even assuming that the prospect of the child losing his mother poses a grave risk to the child's well-being, there is no basis to disturb the district court's finding that Lee has not made a clear and convincing showing that any of the scenarios that she raised is likely to occur.

a. Loss of custody through Syariah Court proceedings

Lee argues that Souratgar's attainment of custody in a Syariah Court is preordained. The district court heard expert

presumptions in custody determinations that favor fathers over mothers and Muslims over non-Muslims. Lee has not
107 shown, *107 however, that the question of custody is likely to be decided by a Syariah Court upon repatriation, much less that such courts are predisposed to reach a certain outcome. If anything, the record is to the contrary. Lee successfully obtained a dismissal of the order of the Malaysia Syariah Court, which had awarded the couple joint custody, for lack of jurisdiction. Furthermore, her aspersions on Syariah proceedings in Singapore are inconsistent with her consent in February 2012 to have custody decided by that court.

Moreover, the Singapore Syariah Court has pendant, not exclusive jurisdiction, to hear child custody matters among Muslim couples. By statute, divorce actions between individuals of the Muslim faith, a religious minority in Singapore, must be brought in the country's Syariah Court. Administration of Muslim Law Act ("AMLA") Â§ 35(2)(b) (2013) (Sing.). But any party to a divorce proceeding before the Syariah Court may apply for leave to have custody decided by a secular court. *Id.* Â§ 35A(1) & (2). And when both parties consent, they do not need to apply for leave in the Syariah Court to have custody matters decided in a secular court. *Id.* Â§ 35A(5)-(7). Souratgar has committed to pursue any custody proceedings, upon repatriation, in Singapore's civil courts. Even if this undertaking is unenforceable, as Lee insists, she may still invoke it, as well as this Court's decision, in any application to transfer the custody determination from the Singapore Syariah Court under AMLA Â§ 35A(1). In light of these options, we cannot fault the district court's conclusion that Lee failed to make a sufficient showing that the question of custody will be decided by a Syariah Court. [7]

b. Risk of father's flight to Iran

Lee also claims that Souratgar will abscond with Shayan to Iran to subvert the custody proceedings in Singapore. She testified that Souratgar has expressed a preference for Iranian military schooling for the boy, that he would like to take Shayan to see the boy's paternal grandparents in Iran, and that he has considered the possibility of relocating his business activity to that country. The district court, however, found no credible showing that Souratgar would abduct the boy to Iran or any other country in violation of a court order, and we discern no error in this finding. *See* Charalambous, 627 F.3d at 469 (denying relief under Article 13(b) where mother's "subjective perception of a threat ... was not corroborated by other evidence in the record" (quotation marks omitted)); *Walsh,* 221 F.3d at 221 (granting relief after concluding that relying on courts to provide protection had "little chance of working" given the respondent's history of violating court orders). We cannot fail to observe, moreover, that unlike Lee, Souratgar has to date honored the legal requirements of the courts in Singapore.

c. Apostasy

Finally, Lee claims that Souratgar exposed her to being charged with apostasy, which she says, is a capital offense in Malaysia and thus created a "grave risk" that Shayan would lose his mother. This claim is based on the testimony of Yasmeen Hassan, Lee's expert witness on Islamic law, who testified that apostasy is punishable by death in Malaysia. The claim distorts both the facts and law. Souratgar did not accuse Lee of leaving the faith. In his attempt to obtain
108 access to *108 Shayan in Malaysia, Souratgar filed an affidavit with Malaysia's Syariah Court reporting that Lee had committed certain acts in violation of Islamic law, such as selling cakes containing alcohol online and attending church. Additionally, although punishment for those who abandon the Muslim faith has been debated in Malaysia, the national government has consistently blocked any formal implementation of rules concerning apostasy. *See* Kikue Hamayotsu, *Once a Muslim, Always a Muslim: The Politics of State Enforcement of Syariah in Contemporary Malaysia,* 20 S.E. Asia Research 399, 400 (2012); Abdullah Saeed & Hassan Saeed, *Freedom of Religion, Apostasy and Islam* 19 (2004). Hence, there is no indication that Lee could even be charged with apostasy in Malaysia, much less face the death penalty.

109

D. Lee's Article 20 defense

The Article 20 defense allows repatriation to be denied when it "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." U.S. State Dep't, *Hague International Child Abduction Convention: Text and Legal Analysis*, Pub. Notice 957, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986). The article is to be "restrictively interpreted and applied." *Id.* Article 20 is a "unique formulation" that embodies a political compromise among the states that negotiated the Convention, which "might never have been adopted" otherwise. *Id.* The defense is to be invoked only on "the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process." *Id.* It "is not to be used ... as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed." *Id.* We note that this defense has yet to be used by a federal court to deny a petition for repatriation. Fed. Jud. Ctr., *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 85 (2012).

In urging the Article 20 exception in this case, Lee insists broadly that Syariah Courts are incompatible with the principles "relating to the protection of human rights and fundamental freedoms" of this country. While this general assertion might find sympathy among some in this country as a political statement, we decline to make this categorical ruling as a legal matter. Moreover, Lee has failed to show that the issue of custody is likely to be litigated before Singapore's Syariah Court. Given that failure, we are not inclined to conclude simply that the presence of a Syariah Court in a foreign state whose accession to the Convention has been recognized by the United States is *per se* violative of "all notions of due process."[8] 51 Fed. Reg. 10, 510 (Mar. 26, 1986).

We are also mindful of the need for comity, as "[t]he careful and thorough fulfillment of our treaty obligations stands not only to protect children abducted to the United States, but also to protect American children abducted to other nations-whose courts, under the legal regime created by this treaty, are expected to offer reciprocal protection." *Blondin II*, 189 F.3d at 242. In the exercise of comity, "we are required to place our trust in the *109 court of the home country to issue whatever orders may be necessary to safeguard children who come before it." *Id.* at 248-49; *cf. Carrascosa v. McGuire*, 520 F.3d 249, 261-63 (3d Cir.2008) (criticizing a Spanish court for construing an agreement not to take child out of the United States without the consent of both parents as violating fundamental rights under the Spanish Constitution for citizens to travel and choose their place of residence and using Article 20 to justify denial of repatriation).

For all of the above reasons, we conclude that the district court did not err in rejecting Lee's Article 20 defense.

III. Conclusion

We have considered all of Lee's remaining arguments and find them to be without merit. For the foregoing reasons, the district court's grant of Souratgar's petition for his son's repatriation is AFFIRMED.

[1] The parties dispute whether, as Lee alleges, Shayan also has an Iranian passport.

[2] The district court's findings as to the charges and countercharges of domestic abuse by the parties are set forth in the district court's opinion. *See Souratgar*, 2012 WL 6700214, at *7-10, *11, *12 & *13.

[3] The district court declined to credit Lee's charge that Souratgar compelled her to engage in certain sexual acts, noting that text messages she sent him indicated her willing participation. The text messages, however, were sent well before the acts had allegedly occurred, and it is of course possible for express or implied consent to sex to be withdrawn after it is given. Even if the text messages were sent close to (or even after) the alleged acts, that would not in itself indicate that Lee was a "willing participant" or *ipso facto*

regarding the credibility of Lee's testimony, and nothing in the record indicates that its finding was erroneous. Any suggestion that a woman who indicates enthusiasm for a sexual relationship cannot later be taken advantage of in the context of that relationship, however, is mistaken, and we disclaim any indication that our holding today is based on Lee's text messages. Our concerns on this point do not affect our judgment that, viewed in their entirety, the district court's credibility assessments should not be disturbed.

[4] In late 2011, Lee had filed for divorce in Singapore's Syariah Court and used that proceeding to dismiss the temporary joint custody order of the Malaysian Syariah Court.

[5] The United States signed the Convention in 1981 and ratified the treaty, thereby becoming a contracting state, in 1988. *See Ozaltin v. Ozaltin*, 708 F.3d 355, 358 n. 4 (2d Cir. 2013). Under Article 38, one state's accession will have effect with respect to another contracting state only after such other state has declared its acceptance of the accession. 1343 U.N.T.S. at 104. Singapore signed the Convention in 2010 and ratified it on March 1, 2011. Singapore's accession was accepted by the United States on February 9, 2012 and entered into force on May 1, about three weeks before Lee left Singapore with Shayan.

[6] In rejecting Dr. Cling's "coercive control" analysis, the district court stated that the evidence did not "support any conclusion that petitioner is an obsessed or jilted lover who seeks to be reunited with respondent or prevent others from being with her." *Souratgar*, 2012 WL 6700214, at *10. Although we find no error in the district court's substantive treatment of Dr. Cling's testimony, she did not testify that Souratgar was controlling because he had been "jilted." The arguments of Lee and *amici* regarding the risk of violence from a formerly abusive spouse do not depend on any such characterization, and we disclaim any suggestion that only a person dealing with an "obsessed or jilted lover" might face such a risk. As we have explained, however, we find no clear error in the district court's finding that the facts here do not indicate a grave risk of harm to the child in this particular instance.

[7] Lee also claims that Souratgar schemed to deprive her of her Malaysian citizenship and jeopardize her ability to contest Shayan's custody in Singapore. We have considered this argument and find it to be without merit.

[8] Indeed, such a holding would contradict the State Department's view expressed upon Singapore's accession as a bilateral partner under the Convention last year, that Singapore is a "role model" among states in the region. *United States and Singapore become Hague Abduction Convention Partners*, U.S. Dep't of State, May 3, 2012, http://www.state.gov/r/pa/prs/ps/2012/05/189236.htm.

In the Matter of One Infant Child, ABDOLLAH NAGHASH SOURATGAR, Petitioner,

v.

LEE JEN FAIR, Respondent,

No. 12 Civ. 7797 (PKC)

United States District Court, S.D. New York.

February 19, 2014.

MEMORANDUM AND ORDER

P. KEVIN CASTEL, District Judge.

Petitioner Abdollah Naghash Souratgar filed a petition seeking the return of his son to Singapore pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, Oct, 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 ("Hague Convention") and the International Child Abduction Remedies Act, 42 U.S.C. Â§Â§ 11601 et m. ("ICARA"). After multiple ex parte proceedings and a nine-day evidentiary hearing, the Court granted the petition. The Second Circuit affirmed. Souratgar v. Lee, 720 F.3d 96 (2d Cir. 2013). After the mandate issued, counsel for Souratgar moved for attorney's fees and expenses, seeking a total amount of $618,059.61.[1] Respondent Lee Jen Fair opposes this motion. For the reasons stated below, petitioner's motion is granted in part and denied in part.

LEGAL STANDARD

The Hague Convention provides that, "[u]pon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child . . . to pay necessary expenses incurred by . . . the applicant." Hague Convention, art. 26. In contrast, the ICARA directs that a court "shall" award necessary expenses to a prevailing petitioner, unless the respondent establishes that a full award "would be clearly inappropriate:"

> Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.
>
> 42 U.S.C. Â§ 11607(b)(3).

The fee-shifting provision is intended "to restore the applicant to the financial position he or she would have been in had there been no removal or retention" and "to deter such conduct from happening in the first place." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494-01, 10511 (Mar. 26, 1986).

return of the child, is responsible in the first instance for determining what costs, if any, should be assessed against [respondent], with respect to both the District Court and Court of Appeals proceedings." Hollis v. O'Driscoll, 739 F.3d 108, 113 (2d Cir. 2014).

"[A] prevailing petitioner in a return action is presumptively entitled to necessary costs, subject to the application of equitable principles by the district court. Absent any statutory guidance to the contrary, the appropriateness of such costs depends on the same general standards that apply when `attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion.' `There is no precise rule or formula for making these determinations, but instead equitable discretion should be exercised in light of the [relevant] considerations.'" Ozaltin v. Ozaltin, 708 F.3d 355, 375 (2d Cir. 2013) (quoting Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994)) (alteration in original). "[T]he court . . . has the obligation to determine whether the requested fees and costs were `necessary' to secure the childri's return." Aldinger v. Segler, 157 Fed. App'x 317, 318 (1st Cir. 2005) (per curiam). "[T]he burden of proof to establish the `necessity'-which implies `reasonableness'-of the expenses (including the attorney's fees) is upon the [petitioner]." Guaragno v. Guaragno, 09 Civ. 187 (RO) (RKR), 2010 WL 5564628, at *1 (N.D. Tex. Oet. 19, 2010) (Findings of Fact and Recommendation of Magistrate Judge Robert K. Roach) (adopted by 2011 WL 108946 (Jan. 11, 2011)).

DISCUSSION

I. Domestic Attorney's Fees and Costs

"The `lodestar' approach is the proper method for determining the amount of reasonable attorneys' fees once a court orders the return of the child under the Hague Convention." Knigge v. Corvese, 01 Civ. 5743 (DLC), 2001 WL 883644, at *1 (S.D.N.Y. Aug. 6, 2001) (quoting Distler v. Distler, 26 F. Supp. 2d 723, 727 (D.N.J. 1998). "Both [the Second Circuit] and the Supreme Court have held that the lodestarâ€"the product of a reasonable hourly rate and the reasonable number of hours required by the case creates a "presumptively reasonable fee." Millea v. Metro-North R. Co., 658 F.3d 154, 166 (2d Cir. 2011). The presumptively reasonable attorney's fee is calculated by setting the reasonable hourly rate and multiplying it by the hours spent on the client's matter. Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany and Albany Cnty. Bd. of Elections, 522 F.3d 182, 186 (2d Cir. 2008). "The reasonable hourly rate is the rate a paying client would be willing to pay." Id. at 190. The Court should endeavor to determine "the market rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Gierlinger v. Gleason, 160 F.3d 858, 882 (2d Cir. 1998) (internal quotation marks omitted). The court "should . . . bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively." Arbor Hill, 522 F.3d at 190.

The starting point is a determination of whether the proposed hourly rate is reasonable in this district for the type of services and work. Id. In setting the reasonable hourly rate, Arbor Hill approves the use of the twelve Johnson factors cited in Arbor Hill and several related considerations: "the complexity and difficulty of the case, the available expertise and capacity of the client's other counsel (if any), the resources required to prosecute the case effectively (taking account of the resources being marshaled on the other side but not endorsing scorched earth tactics), the timing demands of the case, whether an attorney might have an interest (independent of that of his client) in achieving the ends of the litigation or might initiate the representation himself, whether an attorney might have initially acted pro bono (such that a client might be aware that the attorney expected low or non-existent remuneration), and other returns (such as reputation, etc.) that an attorney might expect from the representation." Id. at 184.[2] "[Clonsiderations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate." Perdue v. Kenny A ex rel Winn, 559 U.S. 542, 553 (2010).

a. Law Offices of Robert D. Arenstein

Souratgar seeks $400,849.08 in attorney's fees and costs for the services of the Law Offices of Robert D. Arenstein. (Reply Affirmation of Robert D. Arenstein Â¶ I.B.C.)

i. Hourly Rate

The petitioner's prima facie burden of demonstrating that respondent removed the child from his habitual residence in breach of the petitioner's custody rights was uncontested by the respondent. Respondent relied on two affirmative defenses under the Hague Convention, on which she bore the burden of proof. This case was heard on an expedited basis and involved an appeal to the Second Circuit, which is not unusual in Hague Convention and ICARA litigation. See, e.g., Hollis v. O'Driscoll, 739 F.3d 108, 113 (2d Cir. 2014), Ozaltin v. Ozaltin, 708 F.3d 355 (2d Cir. 2013).

Souratgar was billed by Robert Arenstein at a rate of $600.00 per hour.

(Arenstein Reply Affirm. Â¶ I.B.A; I.B.B.) Sandra Nunez, Arenstein's associate, billed at the rate of $300.00 per hour. (Arenstein Reply Affirm, Â¶ I.B.A.) Arenstein has practiced law for forty years, has practiced in the matrimonial and family law field for thirty-seven years, and has handled many Hague Convention cases. (Affirmation of Robert D. Arenstein at 5.) Nunez is a "fourteen year associate" in the Law Offices of Robert D. Arenstein, and has been practicing law since 1987. (Affirmation of Sandra R. Nunez Â¶Â¶ 20.) From 1982 to 1987, she served as a law clerk to the Honorable Maurice W. Grey, Acting Supreme Court Justice, Bronx County. (Nunez Affirmation Â¶ 20.) Arenstein and Nunez provided their resumes in support of the motion for fees. (Arenstein Affirm. at 8-12; Nunez Affirm. at 12.)

In support of his attorneys' proposed hourly rates, Souratgar's counsel submitted the affirmation of Allan D. Mantel, a matrimonial law attorney, who attests that Arenstein and Nunez's billable rates are reasonable in this district for attorneys of their experience and qualifications. (Affirmation of Allan D. Mantel Â¶Â¶ 5-6.) Mantel states that his hourly rate is $750.00 per hour, and that $600.00 per hour is a reasonable rate for Arenstein, who has more experience than Mantel. (Mantel Affirmation Â¶Â¶ 4, 6.) Mantel submits his affirmation to "attest to the reasonableness of legal fees in Hague actions, under 42 U.S.C. 11607(b)(3) in the Southern District of New York and the 2d Circuit Court of Appeals." (Mantel Affirmation Â¶ 2.) He does not state whether he is experienced in Hague Convention litigation or whether his hourly rate is consistent with the rates of other attorneys in this district who practice in this niche area of law.

"In determining the reasonableness of the requested attorneys' fees, the Court considers the quality of the work done by the attorneys." Harris v. Fairweather, 11 Civ. 2152 (PKC) (AJP), 2012 WL 3956801, at *8 (S.D.N.Y. Sept. 10, 2012) (Report and Recommendation of Magistrate Judge Andrew J. Peck) (adopted by 2012 WL 5199250 (S.D.N.Y. Oct. 19, 2012)). The Court concludes that the hourly rate sought for petitioner's lead counsel's services exceeds a reasonable rate. He stated on the record to the Court that he has "probably handled, and counseled, and advised over 400 [Hague Convention] cases." Tr. Oct. 18, 2012, 22:13-14. Upon questioning from the Court at a later conference, he conceded that "[he] ha[d] not filed a notice of appearance in 400 cases" but that he had "been involved in over 400 cases . . . with lawyers that call [him] for advice." Tr. Oct. 22, 2012, 5:17-21.

Ordinarily, there is no reason for the Court to comment on the quality of an attorney's work. The present motion requires the Court to do so in this case. Petitioner's lead counsel did prevail in this matter and he did devote time and resources to this matter. But, even allowing for the time-sensitive nature of the work, it did not reflect the skill, learning,

of law in support of his initial ex parte petition. Tr. Oct. 18, 2012, 18:22-20:17. He submitted an order to show cause to the Court for its signature bearing the caption of the Eastern District of New York. (Docket No. 4.) Counsel's 56-page long reply memorandum of law in support of this motion for fees failed to comply with this Court's Individual Practices 2.C, which places a 10-page limitation on reply memoranda without prior permission. Lead counsel's trial skills were not those of an attorney whose services would warrant a rate of $600.00 per hour. See, e.g., Tr. Dec. 3, 2012, 11:3-14:18 (provided Court, witness, and respondent's counsel with three different versions of document purported to be the same exhibit); Tr. Dec. 11, 2012 692:5-23 (Court-ordered recess because of disorganization of petitioner's cross-examination); Tr. Dec. 11, 2012, 715:23-716:3 (re-marking exhibits during cross examination); Tr. Dec. 14, 2012 1085:1-1091:21 (difficulty providing answers to Court-posed questions). The foregoing may appear as nit-picking, but these are some examples that support the overall conclusion reached over the life of the proceeding that counsel's work in this case does not warrant the rate sought. The Court concludes that a rate of $425.00 per hour is reasonable on this record. See M.C. ex rel. E.C. v. Dep't of Educ., 12 Civ. 9281 (CM) (AJP), 2013 WL 2403485, at *6 (S.D.N.Y. June 4, 2013) (Report and Recommendation of Andrew J. Peck) (adopted by 2013 WL 3744066 (S.D.N.Y. June 28, 2013)) (awarding attorney's fees to family law expert with 25 years of experience at a rate of $375 per hour in IDEA case).

Fair challenges Nunez's fee because she had not entered a notice of appearance on the docket in this case prior to the date of Fair's memorandum in opposition to this fee application. (Docket No. 102.) Although her appearance was not reflected on the docket, Nunez participated in the drafting of papers and was present before the court during the course of the hearing. According to Nunez's affirmation, she has practiced law for 26 years. Nunez's rate of $300.00 per hour is reasonable given her experience. See K.F. v. Dep't of Educ., 10 Civ. 5465 (PKC), 2011 WL 3586142, at *5-6 (S.D.N.Y. Aug. 10, 2011) (amended by 2011 WL 4684361 (Oct. 5, 2011) (concluding, after review of attorney's fees in cases in the Southern District, that an award of $375.00 per hour for experienced attorneys in an IDEA case).

The reasonable hourly rate for Arenstein's work on this matter is $425.00 per hour and for Nunez's work on this matter is $300.00 per hour.

ii. Billable Hours

Arenstein and Nunez have submitted time records in support of a claim of a total of 768.3 hours on this case. Arenstein billed 564.97 hours and Nunez billed 203.33 hours. Counsel states that Souratgar was charged for Arenstein's time at the hearing, but not for Nunez's time. (Mem. in Stipp. at 5.) But the time records submitted to the Court reflect time charged for both Nunez and Arenstein for time at the hearing. Nunez's time at the hearing, approximately 58 hours, will be deducted from the award.

The records submitted in support of the fee application reflect that Arenstein spent approximately 60 hours of billable time and Nunez spent approximately 6 hours of billable time devoted to visitation disputes during the pendency of the proceeding, which are not recoverable, and will be deducted from the award. See Saldivar v. Rodela, 894 F. Supp. 2d 916, 937 (W.D. Tex. 2012) (denying fees and costs incurred in obtaining a court order providing for increased visitation hours), Aldinger v. Selger, 338 F. Supp. 2d 296, 298 (D.P.R. 2004), aff'd, 157 Fed App'x 317 (1st Cir. 2005) (reducing fees in part because at least 20 billable hours were spent on visitation issues). The Court will reduce the number of billable hours accordingly.

The records also reflect that Arenstein and Nunez each undertook ministerial tasks more suitable for a less senior attorney, paralegal, or assistant. Additionally, Arenstein and Nunez collectively billed approximately 85 hours on the motion for attorney's fees. The Court finds that 85 hours is excessive for a fee application. Taking all of these factors into consideration, after the deduction of Nunez's 58 hours at the hearing and the deduction of the hours dedicated to visitation, a reduction of the balance of billable hours by 15% is appropriate. See Matusick v. Erie Cntv. Water Auth..

739 F.3d 51, 84-85 (2d Cir. 2014) (upholding district court's 50% across-the-board reduction of attorney's fees award).

iii. Litigation Expenses

Petitioner's counsel also seeks $1,274.08 in reimbursement of costs, including the $350.00 filing fee and $924.08 in printing costs. These expenses are reasonable, and they will be included in the award.

b. Scolaro, Shulman, Cohen, Fetter & Burnstein P.C.

Souratgar seeks $550.00 in fees for work conducted by the law firm Scolaro, Shulman, Cohen, Fetter & Burnstein, P.C. Souratgar states that this firm "reviewed his case and corresponded with his counsel." (Souratgar Aff. Â¶ 8.) Souratgar has not established that this work was necessary to the return of the child or how this work did not duplicate work already conducted by Souratgar's other counsel. "While [petitioner] should not be penalized for his choice of counsel, neither should [respondent] bear the burden of multiple representations." Aldinger, 338 F. Supp. 2d at 298. The request for these fees is denied.

II. Foreign Counsel and Fact Witness Fees

Souratgar also seeks attorney's fees in the amount of $51,629.88 and travel expenses in the amount of $20,972.00 incurred by the Singapore law firm Gomez Vasu. Souratgar refers to these fees as expert fees in his affidavit, but the affidavit of Winnie Gomez indicates that application seeks reimbursement for legal services by a foreign attorney. (Souratgar Aff. Â¶ 10; Gomez Aff. Â¶ 11.) Winnie Gomez is an Advocate and Solicitor who has practiced law in Singapore for 26 years. Rakesh Vasu has practiced law in Singapore for 16 years. Gomez and Vasu advised Arenstein on the laws of Singapore and Malaysia, discussed legal strategy with Arenstein, and reviewed drafts of submissions to this Court and the Second Circuit. (Rep. Mem. at 40-42.) They are not entitled to be compensated for legal advice and strategy regarding Souratgar's case in this Court, nor may they recover for coordination between proceedings in this Court and other foreign tribunals. "[The foreign attorney] did not represent [Petitioner] in the instant action before this Court. There is no showing that [the foreign attorney] is admitted to practice in [this state] or before this Court. [Petitioner] has not submitted any authority which allows this Court to award fees and costs incurred by an attorney who does not represent a party in an action before this Court." Freier v. Freier, 985 F. Supp. 710, 714 (E.D. Mich. 1997). But see Distler v. Distler, 26 F. Supp. 723, 728 (D.N.J. 1998) (awarding fees for a foreign attorney who provided legal services to the petitioner in support of the Hague Convention petition). The motion is denied with regard to all attorney's fees and expenses for Rakesh Vasu.

Ms. Gomez testified as a fact witness, not as an expert witness, during the evidentiary hearing. Souratgar v. Fair, 12 Civ. 7797 (PKC), 2012 WL 6700214, at *1 (S.D.N.Y. Dec. 26, 2012). She is entitled to reimbursement for travel expenses and lost time due to her testimony. Prasad v. MML Investors Services, Inc., 04 Civ. 380 (RWS), 2004 WL 1151735, at *5 (S.D.N.Y. May 24, 2004) ("[T]he federal courts . . . are generally in agreement that a witness may properly receive payment related to the witness' expenses and reimbursement for time lost associated with the litigation."). Souratgar has established that Gomez's trip to the United States to testify was necessary to the return of the child. Gomez's business class flight is not compensable at the rate of $8,113.00. 28 U.S.C. Â§ 1821(c)(1) provides that a witness shall be paid for "the actual expenses of travel" at the "most economical rate reasonably available." See Salvidar, 894 F. Supp. 2d at 947 (applying 28 U.S.C. Â§ 1821 to a Hague Convention case). Gomez shall be compensated for the reasonable cost of a round trip coach flight to Singapore at the price of $2,038.00.[3] Gomez's nightly hotel rate of $369.00 was within the range of reasonableness, and the Court will compensate her for three

nights.[4] Gomez charged Souratgar a daily fee of $783.63 per day, which she attests is a reduction of her usual rate. (Gomez Aff. Â¶ 16.) The Court finds this rate reasonable compensation for her lost time. Accordingly, the Court concludes that Gomez may be compensated for time spent travelling to New York and preparing for her testimony for four days in the amount of $3,134.52, the reasonable cost of accommodations in New York in the amount of $1,107, and the cost of a round-trip flight to New York in the amount of $2,038.00.

III. Expert Fees

Souratgar requests expert fees in the amount of $21,500. He seeks $13,000 in fees for the expert testimony of Abed Awad, an expert on Singapore and Malaysian law, and $8,500 in fees for a child psychologist he identifies only as "Dr. Lubit."

a. Abed Awad

In support of his motion for Awad's expert fee, Souratgar has provided copies of two checks addressed to Mr. Awad totaling $13,000.00.

> "To determine whether an expert's proposed rate is reasonable, courts in this Circuit are guided by eight factors: (1) the [expert]'s area of expertise, (2) the education and training that is required to provide the expert insight that is sought, (3) the prevailing rates for other comparably respected available experts, (4) the nature, quality and complexity of the discovery responses provided, (5) the cost of living in the particular geographic area, (6) the fee being charged by the expert to the party who retained him, (7) fees traditionally charged by the expert on related matters, and (8) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26."

Matteo v. Kohl's Dep't Stores, Inc., 09 Civ. 7830 (RJS), 2012 AWL 5177491, at *5 (S.D.N.Y. Oct. 19, 2012), aff'd, 533 Fed App'x 1 (2d Cir. 2013). Awad testified at trial regarding Islamic family law and the Singapore legal system. He testified that he is admitted to practice law in New York and New Jersey, and that a substantial part of his practice is devoted to matrimonial litigation. He also testified that he has certain expertise in Islamic family law and the family laws of Muslim countries. Tr. Dec. 5, 2012, 225:10-15. He stated on the record that he bills at the rate of $550.00 per hour, Tr. Dec. 5, 2012, 225:17-18. In support of this motion, Souratgar has provided no evidence of Awad's rate, the services provided, or any data regarding comparable experts. He has not established what work Awad conducted that would make his fees reasonable. Souratgar has not provided relevant documentation of the services provided to him by Awad, or any evidence of Awad's compensation rate. "In the face of very limited evidence, a court may, in its discretion, simply apply an across-the-board reduction of expert's fees. Matteo, 2012 WL 5177491, at *5. The court will allow a total of 8 hours (which includes time testifying and preparing to testify) at the rate of $300 per hour, for a total of $2,400.

b. Dr. Lubit

Souratgar has not demonstrated how Dr. Lubit's fee of $8,500.00 was necessary to the return of the child, Dr. Lubit did not testify at the evidentiary hearing, and Souratgar has not established that Dr. Lubit's fees were necessary to the return of the child. "There is no authority allowing a prevailing party to recover expert witness fees of a witness who did not testify at trial." Freier v. Freier, 985 F. Stipp. 710, 714 (E.D. Mich. 1997). Accordingly, Souratgar's request for Dr. Lubit's fee is denied.

IV. Transcript Costs

Souratgar sought fees for the "cost of the nine day hearing," and referred the Court to a credit card receipt with a $1,465.20 charge to "Southern District R" dated January 8, 2013. (Souratgar Aff. Â¶ 14 and Ex. 10.) The Court interprets this charge as a charge to the Southern District Reporters for transcripts of the hearing. It is reasonable to reimburse Souratgar for the costs of the transcripts of the hearing, in the amount of $1,465.20.

V. Travel and Lodging Fees

Souratgar seeks $2,038.00 for his round trip flight from Singapore to New York, $1,479.00 for his change of flight from New York to Singapore and his son's return flight to Singapore, and lodging fees totaling $22,579.84. (Souratgar Aff. Â¶ 15-16.) At an ex parte proceeding on October 22, 2013, this Court informed Arenstein that Souratgar would be required to testify and present his passport and visa to the Court. Tr. Oct. 22, 2013, 17:10-12. Souratgar appeared in this Court on November 1, 2013, and, without objection, consented to a request that he surrender his passport during the pendency of the proceedings. Tr. Nov. 1, 2013, 19:8-16. Thereafter, he was unable to return to Singapore until July 9, 2013, one day after the issuance of the mandate by the Court of Appeals, when this Court ordered the United States Marshal Service to return Souratgar's passport. (Docket No. 89.) The Court finds the length of the stay necessary to the return of the child.

Although it was necessary for Souratgar to remain in the United States during the pendency of the proceedings, Souratgar has not established that the cost of his accommodations was reasonable. Souratgar resided in Kingston, New York, which is located approximately 100 miles from the courthouse located at 500 Pearl Street in Manhattan. Souratgar only argues that the costs of lodging were reasonable because of the "cost of living in the New York metropolitan area." (Reply Mern. at 53.) Souratgar has not demonstrated that an average rent of approximately $2,800.00 per month in Kingston, New York is reasonable. The Court finds that a reduction in the lodging costs of 25% is appropriate given the lack of documentation supporting the rate as reasonable. Accordingly, the Court grants Souratgar's motion for travel expenses in the amount of $3,517.00 and lodging expenses in the amount of $16,934.88.

VI. Investigative Fees

Souratgar seeks reimbursement for $92,958.10 in investigative fees. A petitioner may be entitled to recover investigation costs if such costs are "necessary" to secure the return of the child. Neves v. Neves, 637 F. St/pp. 2d 322, 344 (W.D.N.C. 2009) (finding, after reviewing supporting documentation, that an expense of $10,324.65 in investigative fees was reasonable and necessary). The Court has reviewed the supporting documentation for the investigative fees. While some award of investigative fees is appropriate, these fees should be reduced, as not all expenses were necessary to secure the child's return and Souratgar has not demonstrated that the rates charged by the investigators were reasonable. Souratgar has submitted invoices from three separate investigative firms.

The Court concludes that of the $92,958.10 in fees incurred, $44,328.50 were necessary costs to secure the child's return.[5] The Court does not find that investigative fees incurred after the issuance of the warrant were necessary to secure the return of the child. Just as attorney's fees regarding visitation are not recoverable under the ICARA, investigator hours supervising visitation and other investigative work after the issuance of the warrant are not recoverable. Additionally, investigative hours spent conducting background checks on potential lawyers to bring the petition were not necessary to secure the return of the child, and are not compensable.

Souratgar has not demonstrated the reasonableness of the rates paid for the investigative services. "If the parties do not provide sufficient evidence to support the moving party's interpretation of a reasonable rate, a court may use its discretion to determine a reasonable fee." Matteo, 2012 WL 5177491, at *5 (discussing expert and expert investigator fees). Accordingly, the Court reduces the award for investigative fees by 25%. Souratgar's motion for investigative fees is granted in the amount of $33,246.38.

VII, Medical Costs

Souratgar requests $1,938.51 in miscellaneous medical fees incurred for his son while in New York. Souratgar has not demonstrated that these fees were related to securing the return of the child. The ICARA provides that a respondent shall pay a prevailing petitioner for "foster home or other care during the course of the proceedings in the action." 42 U.S.C. Â§ 11607(b)(3). Souratgar has not shown how these medical costs were akin to foster care during the pendency of the action, which the Court reads as contemplating care for the child in the event that a parent is unable to care for the child himself due to legal or geographical difficulties. He has not cited any court that has granted such expenses under the ICARA. See Clarke v. Clarke, 08 Civ. 690, 2008 WL 5191682, at *3 (ED. Pa. 2008) (petitioner father brought motion for attorney's fees and expenses, but did not petition for cost of medical expenses for child with special medical needs, which he paid throughout pendency of the proceeding). A child's medical bills are among the ordinary costs of parenting, not costs attributable to the petition or the child's return. Souratgar's request for these fees is denied.

VIII. Clearly Inappropriate Standard

"Although Article 26 of the Hague Convention provides that a court `may' award `necessary expenses' to a prevailing petitioner, Â§ 11607(b)(3) shifts the burden onto a losing respondent in a return action to show why an award of `necessary expenses' would be `clearly inappropriate.' 42 U.S.C. Â§ 11607(b)(3). Nonetheless, Â§ 11607(b)(3) retains what we have previously described as the `equitable' nature of cost awards." Ozaltin, 708 F.3d 355, 375 (internal citations omitted). "The district court has the duty, under 42 U.S.C. Â§ 11607(b)(3), to order the payment of necessary expenses and legal fees, subject to a broad caveat denoted by the words, `clearly inappropriate,'" Id. (quoting Whallon v. Lynn, 356 F.3d 138, 140 (1st Cir. 2004). In Ozaltin, the Second Circuit determined that it would be "clearly inappropriate" to award all necessary expenses associated with the father's action because of the mother's legitimate basis for removing the children from Turkey and the possibility that the father was forum shopping by bringing the action in New York rather than in Turkey. Ozaltin, 708 F.3d at 375. On remand, Judge Swain denied the father's fee application in its entirety. In re. S.E.O., 12 Civ. 2390 (LTS), 2013 WL 4564746, at *5 (S.D.N.Y. Aug. 28, 2013).

a. Past Domestic Abuse

Fair argues that awarding any fee would be clearly inappropriate in this case because of Souratgar's past abusive behavior towards Fair. "Acts of family violence perpetrated by a parent is an appropriate consideration in assessing fees in a Hague case . . . ." Guaragno v. Guaragno, 09 Civ. 187 (RO) (RKR), 2010 WL 5564628, at *2-3 (N.D. Tex. Oct. 19, 2010) (reducing award, noting that "the husband's physical abuse of his wife, though not a deciding factor as to the Court's order for the return of the child . . . is a significant factor in the determination of the assessment of fees and expenses.") (Findings of Fact and Recommendation of Magistrate Judge Robert K. Roach) (adopted by 2011 NATI, 108946 (Jan. 11, 2011)), see also Silverman v. Silverman, 00 Civ. 2274 (JRT), 2004 WL 2066778, at *4 (D. Minn. Aug. 26, 2004) (denying request for attorney's fees in entirety based, in part, on spousal abuse). Tn Guaragno, the court determined that "Nile mother was faced with a cruel dilemma, whether to continue to receive the physical and

mental abuse from the father of their child, or retreat and suffer the separation from the child. This dilemma was further heightened by the fact that she was pregnant with the couple's second child." Guaragno, 2010 WL 5564628 at *1 The Guaragno court found "that a mother should not be required under the threat of monetary sanctions to choose between continued abuse (mental as well as physical) and separation from a young child and/or financial ruin." Id.

Fair notes that this Court found that Souratgar engaged in abusive conduct towards Fair. Souratgar v. Fair, 2012 WL 6700214, at *11. The Second Circuit did not disturb this Court's characterizations of the relationship on appeal. Souratgar v. Lee, 720 F.3d at 100. But Fair has not established that the past abuse in this case makes an award of fees clearly inappropriate. In Guaragno, the mother faced a "cruel dilemma" because of her continuing relationship with her child's father and her pregnancy with the couple's second child. Fair no longer resided with Souratgar at the time she fled Singapore for the United States, had custody of her son, and had access to the Singapore legal system, which had within its judicial arsenal an order of personal protection. Souratgar v. Fair, 2012 WL 6700214 at *8-11. She did not face the same dilemma as Ms. Guaragno when she absconded to the United States. Domestic abuse of all types is a serious matter. Yet Fair has not established that the past abuse of her was causally related to her decision to leave Singapore with her son in violation of a court order issued by a court of that country. She has failed to establish that the fees sought are clearly inappropriate by reason of the past abuse.

b. Inability to Pay

Fair also argues that it would be clearly inappropriate to award fees based on her inability to pay. Courts have also reduced fee awards in Hague Convention cases based on the respondent's inability to pay. See, e.g., Poliero v. Centenaro, 09 Civ. 2682 (RRM) (CLP), 2009 WL 2947193, at *22 (E.D.N.Y. Sept. 11, 2009) (Report and Recommendation of Magistrate Judge Cheryl L. Pollack) (adopted), aff'd, 373 Fed. App'x 102 (2d Cir. 2010) (any award clearly inappropriate when "petitioner controls all of the finances, and . . . respondent has no appreciable assets of her own, is not employed, and lives on the money that petitioner transfers to her bank account."); Rydder v. Rydder, 49 F.3d 369, 373-74 (8th Cir. 1995) (reducing a requested $18,487.42 to $10,000.00) ("Because of Mrs. Rydder's straitened financial circumstances, however, we find the award of fees and legal costs to Mr. Rydder so excessive as to constitute an abuse of discretion."); Kuther v. Kutner, 07 Civ. 046 (WES) (LDA) 2010 WL 431762, at *5-6 (D.R.I. Feb. 3, 2010) (Report and Recommendation of Magistrate Judge Lincoln D. Almond) (adopted) (reducing fee by additional 25% based on respondent's inability to pay); Berendsen v. Nichols, 938 F. Stipp. 737, 739 (D. Kan. 1996) (reducing fee by 15% in light of respondent's financial status and support of the children).

Fair asserts that she lacks the financial resources to pay any award. (Affidavit of Lee Jen Fair Â¶ 10, 13.) Fair is represented by pro bono counsel in the case before this Court. Fair attests that pro bono representation in Singapore is unavailable to her because legal aid services are restricted to Singapore citizens, and she is a citizen of Malaysia. (Fair Aff. Â¶ 8; Souratgar v. Fair, 2012 WL 6700214, at * 1.) She states that she owes approximately $17,600 in car payments and $3,820.45 in attorney's fees to the law firm that represented her in proceedings in Singapore.[6] (Fair Aff, Â¶Â¶ 8-9, Leidholdt Decl. Ex. B.) She is also currently indebted to her siblings. (Fair Aff. Â¶Â¶ 5, 6, 10.) Fair has not worked in 5 years, and has found it difficult to obtain employment. (Fair Aff. Â¶ 13.) She previously worked as a retail manager for an alcohol distributor and as a brand manager for a jewelry company named Coulisse. (Fair Aff. Â¶Â¶ 2-3.) At the hearing, she testified that she maintained a website called "Intoxicaked," from which she sold two to three cakes a month in exchange for $10 or $20, primarily to her friends. Tr. Dee, 11, 2012, 689:9-690:8. She has not provided the Court with any other information regarding her current income.

Souratgar alleges that Fair is able to pay the nearly $600,000 in fees he seeks. He contends that Fair has approximately $200,000 dollars in a pension fund which she could utilize to pay attorney's fees. (Rep. Affirmation of Robert D. Arenstein, at 18.) Fair provided the Court with a statement of her Central Provident Fund Board ("CPF") Account, which contained $149,558.59 as of December 31, 2012.[7] (Leidholdt Decl. Ex. D.) Fair testified at the

hearing that she is unable to borrow against the pension fund, as it is controlled by a pension fund organization in Singapore. Tr. Dec. 11, 2012, 688.15-689.8. Souratgar submitted a blank copy of an "Application to Withdraw CPF by Malaysians Residing in West Malaysia" in an attempt to demonstrate that Fair has access to the funds.[8] (Arenstein Rep. Affirmation, Ex. F at 3.) The form does not indicate that she will be able to withdraw funds in the near future. A district court has declined to reduce fees in a case under the ICARA based on respondent's inability to pay when she was likely to make a significant amount of money in the future. Norinder v. Fuentes, 10 Civ. 391 (WDS), 2010 WL 4781149, at *10 (S.D. Ill. Nov. 17, 2010), aff'd, 657 F.3d 526, 536-37 (7th Cir. 2011). While it is not clear that Fair will be able to access the funds in her CFP account in the near future, she has not demonstrated that she will never have access to those funds.

Souratgar alleges that Fair owns a one-third interest in a family property in Malaysia. Fair has provided the Court with the sale and purchase agreement, which confirms her interest in the property. (Leidholdt Decl. Ex. C.) But she further asserts that she holds this interest in trust for her brother; however, Fair has come forward with nothing other than her sayso to support the claim of trust. (Fair Decl. Â¶ 11.) In the absence of documentation for the alleged trust arrangement, she has failed to establish that this interest would not be properly reachable by the judgment.

District courts have found an award clearly inappropriate where the child will be adversely affected by the dire financial status of the respondent parent. Fair argues that her son will be adversely affected by any award because further financial strain will impede her ability to pay her Singapore counsel, which would prevent her from obtaining representation in future custody hearings and may result in the complete loss of the child's relationship with Fair. (Opp. Memo at 7.) Courts that have found an award clearly inappropriate based on the adverse effects of respondent's financial instability on a child have generally reasoned that the custodial parent would be unable to properly care for the child based on their financial condition. See Rydder, 49 F.3d at 373-74, Willing v. Purtill, 07 Civ. 1618 (AA), 2008 WL 299073, at *1 (D. Or. Jan. 31, 2008) (reducing fees by 15% because of respondents' straitened financial circumstances).

Fair does not make such arguments here. She does argue that adding to her debt will further prevent her from continuing custody litigation, resulting in a complete loss of the child's relationship with his mother. As the Second Circuit noted regarding Fair's claim that her son would face a grave risk of harm if she lost custody, lilt is quite conceivable that in some cases one or the other parent may lose legal custody after repatriation and be deprived of access to the child. . . . '[T]he impact of any loss of contact with the mother is something that must be resolved by the courts of the ChildH's habitual residence.'" Souratgar v. Lee, 720 F.3d at 106 (quoting Charalambous v. Charalambous, 627 F.3d 462, 469 (1st Cir. 2010).)

In any event, Fair's claim as to the effects in custody proceedings if an award of fees is entered against her is speculative. Fair has provided the Court with a bill from her Singapore lawyers (Leidholdt Decl. Ex. B), but has not demonstrated, beyond speculation, that she would be unable to acquire representation in the Singapore proceedings as a result of a fee award. In her opposition to the fee application, Fair has not provided the Court with any concrete information about how her lack of funds might affect her under Singapore or Malaysian law.

Singapore is a common law country and Fair has not endeavored to explain whether and to what extent her wages may be subject to garnishment or pension assets reached. She has not explained whether and to what extent her interest in property jointly owned with others in Malaysia could be reached. She has not explained whether and to what extent a judge presiding over a divorce proceeding with her present husband, Souratgar, could take account of the judgment in adjudicating her rights to any marital or other property. Instead, Fair speculates that she is likely to face jail time because "Mr. Souratgar's Singapore lawyer, Ms. Gomez, has made it clear that Souratgar intends to pursue his contempt of court application" (Fair Dec1.118.) Fair has not provided the Court with any documentation of her assets or income beyond the CFP account and the deed of her interest in her family's home. See Paulus ex rel. P.F.V. v. Cordero, 12 Civ. 986 (ARC), 2013 WL 432769, at *10 (M.D. Pa. Feb. 1, 2013.) Fair has not established that an award

This Court found that Fair wrongfully removed her son from Singapore and absconded to the United States. By doing so, she violated an order of the Court in Singapore and demonstrated an indifference to whether the young boy would ever see his father again. An unreduced award on the basis of Fair's inability to pay would not be "clearly inappropriate." In Kufner and Berendsen, the district courts reduced the fees by 25% and 15%, respectively, due to respondent's inability to pay. A similar reduction in this case would neither remedy Fair's inability to pay nor serve the purposes of Section 11607(b)(3).

The Court has considered Fair's arguments individually and in their totality, and finds that she has not established that an award of fees would be clearly inappropriate. "To deny any award to Petitioner would undermine the dual statutory purposes of Section 11607(b)(3) restitution and deterrence (both general as to the public and specific as to the Respondent)." Kufner v. Kufner, 07 Civ. 46 (WES) (LDA), 2010 WL 431762, at *5 (D.R.I. Feb. 3, 2010) (Report and Recommendation of Magistrate Judge Louis D. Almond) (adopted).

CONCLUSION

For the reasons stated above, Souratgar's motion is granted in part and denied in part. The Clerk shall enter judgment in favor of Souratgar in the total amount of $283,066.62 for the following:

Attorney's Fees	$217,949.56
Attorney's Costs	$1,274.08
Fact Witness Fees	$6,279.52
Expert Witness Fees	$2,400
Transcript Fees	$1,465.20
Lodging and Travel Fees	$20,451.88
Investigative Fees	$33,246.38

All other relief is denied.

SO ORDERED.

[1] Souratgar's initial fee application sought $569,109.61. In the reply memorandum and supplemental affidavits he requests an additional $48,950.00 in attorney's fees for the services of the Law Offices of Robert D. Arenstein. (Reply Affirmation of Robert D. Arenstein Â¶ I (B)(B).

[2] See Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), abrogated on other grounds by Blanchard v. Bergeron, 489 U.S. 87, 92-93, 96 (1989). "The twelve Johnson factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the `undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." Arbor Hill, 522 F.3d at 187 n.3 (citing Johnson, 488 F.2d at 717-19).

[3] Souratgar seeks $2,038.00 for his own round-trip ticket to New York. Fair does not contest the reasonableness of Souratgar's flight, and the Court adopts the same price for Gomez's flight.

[4] The average price of a hotel room in New York City in 2012 was $281.00. See "NYC Statistic page" NYC: The Official Guide, http://www.nyego.com/articles/nyc-statistics-page (last accessed January 30, 2014). The hearing, however, was held in the month of December which is a peak period and the hearing was convened on relatively short notice. Accordingly, one would expect a higher than average rate.

[5] The investigative firms do not uniformly utilize hourly billing.

[6] Fair's affidavit and attached documentation do not indicate whether the amounts therein refer to Singapore dollars or American dollars.

[7] The account contains three separate sub-accounts: an ordinary account, which contained $109,849.43, a special account, which contained $5,488.99, and a "medisave" account, which contained $34,220.17 as of December 31, 2012. (Leidholdt Decl. Ex. D.)

[8] The request for withdrawal form provides:

"To qualify for withdrawal under section 15(2)(c) of the CPF Act, a member must satisfy ALL the following conditions: 1. He is a Malaysian citizen. 2. He has left Singapore permanently to reside in West Malaysia. 3. He is either: (a) 55 years old or above, or (b) below 55 years old but above 50, and has not worked in Singapore in the two years before his application, or (c) physically or mentally incapacitated from ever continuing in any employment or is found to be of unsound mind. 4. He does not hold a valid Singapore Work Permit or Employment Pass.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

GUSTAVO CORREA SABOGAL,

Petitioner,

v.

MARISA JULIA PAULA VELARDE,

Respondent.

Civil Action No. TDC-15-0448

MEMORANDUM OPINION

When a parent flees to another country with a child in contravention of the other parent's custody rights, the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"), Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501, generally requires the child's immediate return so that custody rights can be determined in the child's country of habitual residence. In this case, Gustavo Correa Sabogal ("Correa") alleges that his wife, Marisa Julia Paula Velarde ("Velarde"), from whom he is separated, wrongfully removed their two minor children, J.G.C.V. and R.G.C.V. (the "Children"), from their native country of Peru to the United States. He has filed a Petition under the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 9001 *et seq.* (2012), seeking their return to Peru under the Hague Convention. Upon consideration of the Petition, the submitted briefs, and the evidence admitted during a four-day bench trial, the Petition is CONDITIONALLY GRANTED.

PROCEDURAL HISTORY

On February 17, 2015, Correa filed his Petition, accompanied by a request for an "emergent *ex parte* hearing" on the Petition and an order to show cause that would bar Velarde

from removing the children during the pendency of the proceedings and requiring Velarde to appear. When Velarde filed a response to the Petition on February 19, the Court denied the request for an *ex parte* hearing but ordered that the Children remain within the jurisdiction of the Court during the pendency of the proceedings. At that time, the parties were engaged in previously filed litigation in the Circuit Court of Montgomery County, Maryland, arising from both parents' efforts to register Peruvian child custody determinations in their favor under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Md. Code Ann., Fam. Law § 9.5-101 *et seq.* (West 2015). Although a trial on those matters was scheduled for April 13, 2015, the parties agreed to stay those proceedings pending the resolution of the Petition. With the parties' consent, the Court scheduled a bench trial on the Petition to start on April 20, 2015. Following the bench trial, the Court ordered the parties to submit any proposed undertakings, accompanied by any relevant evidentiary or legal support.

FINDINGS OF FACT

During the four-day proceeding, the Court heard fact testimony from Correa; Velarde; Daniel Francisco Vigo Parra ("Vigo"), Correa's former security guard and domestic employee; and Elizabeth Benitz ("Benitz"), who supervised visitations between Correa and the Children after they arrived in the United States. The Court heard expert testimony from Carlton E. Munson, Ph.D. ("Dr. Munson"), who conducted psychological evaluations of Velarde and the Children, and John T. Lefkowits, Ph.D. ("Dr. Lefkowits"), who conducted a psychological evaluation of Correa. Several witnesses testified as experts on Peruvian law, including Liliana Garcia-Bustamante Collantes ("Bustamante") (family law), Miguel Grau (constitutional law), Roberto Carlos Pereira Chumbe (criminal and privacy law), and Gustavo Seminano (privacy

law). The Court also admitted numerous exhibits in evidence, including affidavits from Gino Bisso Aguirre ("Bisso") and Omar Taboada, both of whom are employees of Correa.[1]

As one might expect, the parties presented accounts that conflicted in many respects. In particular, there were significant discrepancies between the testimony of Vigo, who testified that he witnessed and heard verbal and psychological abuse by Correa against Velarde and the Children, and Correa, who denied most of Vigo's testimony. Counsel for Correa established on cross-examination that Velarde's family has been paying Vigo the same salary that Correa used to pay him in order to keep him available to testify during the pendency of this case, and that Velarde's family had paid for an attorney for Vigo and for his travel expenses. Nevertheless, having observed the witnesses during the testimony, the Court finds Vigo's testimony to be credible, based on his demeanor and forthright manner in responding to questions, his undisputed testimony that he came forward to the Velarde family on his own because of his concern about the abuse, and his candid acknowledgment of the arrangements made with Velarde's family.

In contrast, the Court has significant concerns about the credibility of Correa. Because he was called by both parties at different points during the bench trial, Correa took the stand three different times. During his first testimony, he appeared arrogant and indignant, accused Velarde of refusing to visit the Children while they resided with him, and summarily denied key facts, such as his prior mental health treatment. But when called to testify following Vigo's damaging testimony, he dramatically altered his presentation to appear contrite and remorseful for mistreating his wife and admitted to undergoing alcohol and drug rehabilitation, yet continued to deny the key elements of Vigo's testimony and launched into defensive monologues. Given this

[1] The Court did not interview the Children. At the end of the hearing, both parties opposed having the Children interviewed and waived any argument that the Children should be interviewed to resolve this dispute.

erratic and self-contradictory presentation, the Court has difficulty relying on his testimony and credits the testimony of Velarde and Vigo on the key elements of verbal and psychological abuse.

Based on all of the evidence presented, testimonial and documentary, the Court finds the following facts:

I. 2003 – 2012: The Marriage and Separation

Correa and Velarde were married in 2003 and resided primarily in San Isidro, a district of Lima, Peru. They have two children, J.G.C.V., born in 2005, and R.G.C.V., born in 2007. Correa is a businessman who makes frequent trips to a farm outside of Lima that he owns and operates. During their marriage, Velarde was a homemaker; she is now studying for a Master's Degree in Business Administration. The maternal and paternal grandparents live nearby in Lima.

There were no notable problems with the marriage until 2008, when Velarde found a handpicked suit laid out on their bed with a note from Correa asking to be buried in the suit if he died in a car accident. At Velarde's urging, Correa sought and obtained psychiatric treatment for two years. In 2010, however, Correa stopped his psychiatric treatment and was noticeably abusing alcohol and drugs. From that time forward, he drank heavily, consuming vodka and orange juice in the morning before retiring to his office to drink throughout the day. Sometimes, Correa concealed the vodka in a coffee cup. He also took prescription medications while under the influence of alcohol: Clonazepam (Rivotril), used to treat seizures and panic disorders;

Diazepam, used to treat anxiety disorders, alcohol withdrawal, muscle spasms, and convulsive disorders; and Atacand, used to treat hypertension.[2]

Under the influence of alcohol and prescription drugs, Correa was verbally aggressive and psychologically abusive. With the Children present, Correa would call Velarde a "bitch" and a "whore." Trial 10:04:25 (Apr. 24, 2015). He threatened her life in several ways. He told Velarde that she "would live with a bullet in her head." *Id.* at 10:04:45. He told her, in front of the Children, that he was going to "eviscerate" her face, that he would "destroy" her, and that she would be living alone on the street. *Id.* at 10:09:40. At another point, Correa stuck a knife in a table as a threat to Velarde.

He also threatened to harm himself and the Children. In 2012, while drinking and with the Children in the room, Correa threatened to throw himself out of the fifth-floor window of the building in which they lived. At another point, he stated that, "If things go wrong, I will kill the boys and myself." Trial 10:04:55 (Apr. 24, 2015). On December 28, 2012, no longer able to take the abuse, Velarde separated from Correa and took the Children to live at her parents' beach house in Peru.

II. December 2012 – June 2013: Velarde Retains the Children

After the separation, Velarde allowed Correa to talk to the Children over the phone. She occasionally permitted him to see the Children for a few hours during the week at a shopping mall in her presence, and for a full day on the weekend at the home of Correa's parents. On one occasion, at the end of February 2013, Velarde allowed the Children to stay overnight with

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[2] Per Velarde's request at trial, the Court takes judicial notice of the descriptions of these medications in the *Physician's Desk Reference*, *available at* http://www.pdr.net (last visited May 18, 2015). *See United States v. Howard*, 381 F.3d 873, 880 (7th Cir. 2004) (taking judicial notice of medical facts in the *Physician's Desk Reference*); *Cunningham v. Scibana*, 259 F.3d 303, 304 (4th Cir. 2001) (relying on a *Physician's Desk Reference* pharmaceutical description).

Correa at his parents' house. Velarde was comfortable with such arrangements because the Children's nanny always accompanied them on these visits, Correa's parents were present during the weekend visits, and Correa told her that he had been seeing a psychiatrist.

Between April and June 2013, Correa sent Velarde a series of aggressive, abusive emails. On April 25, he wrote to her that she would be receiving a demand for divorce, told her that he was filing criminal complaints against her parents and sister, and threatened that his family would "pay all the millions possible" to ensure that he received custody of the Children. Trial Ex. 107, at 290. He also wrote that "your mother's private life will be put out in the open in accordance with the law, and she'll have to bear the shame of her adulterous acts," and that Velarde is "a manipulated brute, a provincial woman who is not good for me." *Id.* at 291. He noted that "Lima is full of spectacular women," and warned, "You want war, you'll get war." *Id.* On April 28, he wrote to Velarde that he was seeing a psychiatrist every week and that he had not had alcohol in five months. Nevertheless, he wrote that she was "acting like a bitch with no feelings," warned her to "get ready because we're going to rip the soul from your shyster lesbian lawyers," and added, "Thank God this world is moved by money and in that you're lost. All of you get ready. You hurt me and now I'll shred you to bits." Trial Ex. 108, at 295. On June 10, Correa wrote that Velarde was "leading a promiscuous life with my children in front of your parents," called her a "slut," and warned, "I AM CAPABLE OF ANYTHING." Trial Ex. 110, at 301 (emphasis in original). In a separate message, he wrote, "keep gathering false evidence and for the babies, you're going to end up in jail. Get ready a real hell is coming for you and your family." Trial Ex. 109, at 298. During this time frame, Correa also spoke to Velarde by telephone and repeatedly screamed insults at her and her family, including that she was a "fucking bitch" and a "daughter of a whore," that her father is a "son of a bastard bitch," and that

her mother is "a stupid whore" and a "fucking whore." Trial Ex. 114. He also threatened her father and her parents, shouting that he would "kick the shit out of him" and "I swear to God I'll kill them." *Id.*

On June 16, after Velarde allowed the Children to spend Father's Day with Correa, he sent an email thanking her, but then claimed that it had been "revealed" to him that someone known to Velarde would suffer tragedies in the coming year: a teenage child would die in a car accident, and other relatives would die of cancer and a heart problem during the year. Trial Ex. 111, at 306.

III. June 2013 – October 2013: Correa Retains the Children

On June 17, 2013, Velarde allowed the Children to visit Correa again to see a puppy he had bought. Correa did not return the Children. When Velarde attempted to visit the Children, Correa instructed his staff to tell her that the Children were not there and to get her out any way they could. On one occasion, when she attempted to visit, Correa shouted at Velarde from the fifth-floor balcony to leave and, in front of the Children and loud enough for the neighbors to hear, called her a "masturbator of kids," and shouted, "You stuck your finger in the ass of the boy." Trial 10:20:00 (Apr. 24, 2015). When Velarde called, if he did not want the Children to talk to Velarde, Correa unplugged the phones.

On July 1, 2013, Velarde obtained a *habeas corpus* order from the Tenth Criminal Court in Lima ordering Correa to give Velarde regular access to the Children. The court explained that Correa had been preventing Velarde from exercising her parental authority and ordered him to stop.[3] On July 3, 2013, Velarde filed a complaint in the Tenth Family Court of Lima seeking

[3] As explained in more detail below, under Peruvian law, "parental authority" encompasses the rights and responsibilities of parents as they relate to their minor children. *See infra* Discussion Part II.A.

legal custody of the Children. On August 23, 2013, she submitted a petition for interim relief seeking temporary custody during the pendency of the proceedings.

Following the *habeas corpus* order, Velarde saw the Children five times, each time accompanied by her sister, Correa's sister, or a friend of Correa. During these visits, which lasted for one to two hours at a time, the Children appeared to her to be distant and scared. Correa would often be in his home office within eyesight, and he would gesture at the Children to prevent them from talking. Correa monitored the visits with a camera that he installed in the room. Despite these visits, during the period from July to October 2013, Correa sent Velarde approximately eight notarized letters, in which he purported to invite Correa to visit the Children but also claimed that she either would not visit or would come to the door but refuse to enter, causing distress to the Children. In one such letter, dated September 6, 2013, Correa reverted to verbally abusing Velarde, stating, "To have to deal with you disgusts me," referring to her as being "typical of dumb and repetitive women," calling her family "trash," and accusing her of being a "sex offender." Trial Ex. 41 at 696–97.

During the months when the Children lived with Correa, his psychologically abusive behavior grew worse as he continued to abuse alcohol, consuming up to three full glasses of vodka while taking pills daily. He repeatedly told the Children that he would harm their mother. At one point, Correa bent a fork in front of the Children and told them, "This is what I'm going to do to your mother when I see her." Vigo Test. 10:1–2, Apr. 23, 2015. He demonstrated to the Children, with a Taser held to his neck, how he would use the Taser on Velarde if she ever tried to take them away, and he talked to them about buying a silencer for a handgun that he kept in the house. The silencer, he mused, would be used to kill Velarde.

Correa engaged the Children in sexually explicit discussions in his efforts to portray Velarde as a child abuser. For several months, Correa referred to Velarde as a "prostitute" when speaking to the Children. Vigo Test. (Direct) 78:17–18, Apr. 21, 2015. He told the Children that she "wants the penis to be stuck in her vagina and your grandmother is like that, too." *Id.* at 78:18–20. He told them that "your mother has stuck her finger in your ass." *Id.* at 78:20–21. Correa coached the Children on what to tell social workers who came to the house, particularly instructing J.G.C.V. to say that Velarde had touched him inappropriately. J.G.C.V. did as instructed.

Correa went further and compelled them to participate in his verbal abuse of their mother and to use vulgar and sexually explicit language in doing so. Correa ordered R.G.C.V. to call his mother a "dog" or a "bitch." *Id.* at 75:11–15, 77:12–15, 91:23–92:2. When he struggled to say the words, Correa insisted that he say them. On another occasion, he compelled J.G.C.V. to write a message that he dictated, to be sent to Velarde, stating that she had raped him, that her father is a "drunkard," that her mother is a "deceitful whore," and that the Children both "hate" her. J.G.C.V. was also instructed to write that Correa would rather "kill himself," and that the Children "would rather die and go to Heaven as angels with Uncle Guillermo," than have them go back to living with her. Vigo Test. (Direct) 17:22–25, Apr. 23, 2015; Trial Ex. 115, at 275. Guillermo is Correa's deceased brother.

Correa also discussed death directly with the Children, including threatening to kill them. At one point, Correa told the Children, "Nothing will ever separate us. First, I will kill you both and then I will kill myself and we will all go together to heaven with Uncle Guillermo." Vigo Test. (Direct) 4:25–85:3, Apr. 21, 2015. On another occasion, when R.G.C.V. had a fever,

Correa told him that he was going to die. R.G.C.V. became so fearful that Vigo had to calm him down.

There was one occasion when Correa turned violent. One day, when J.G.C.V. returned home with bad grades, Correa threw a large book at him that struck him in the face and broke open his lip.

IV. October 2013 – Present: Velarde Regains the Children and Departs Peru

Both parties appealed the July 2013 *habeas corpus* order: Velarde on the ground that the order did not require the return of the Children to her, and Correa on the ground that the judge should not have granted the order at all. On October 17, 2013, the Court of Appeals of Lima affirmed the lower court ruling that Correa must "immediately stop preventing [Velarde] from fully exercising her parental rights," and further ordered that the Children be returned to Velarde so that "the situation be reinstated to its condition prior to" Correa taking physical custody of the Children on June 17. Trial Ex. 7, at 206, 207. On November 21, 2013, in response to Velarde's earlier petition for temporary custody, the Family Court issued a *no innovar*, a Peruvian injunction order, in which it ordered the "preservation of the *de facto* situation," effectively endorsing Velarde's temporary custody over the Children. Trial Ex. 8, at 260.

The Children were returned to Velarde as they arrived home from school on October 29, 2013. Correa could not bear to watch the exchange. He sat on the floor inside the family home with a glass of vodka and asked Vigo if he had his gun. When Vigo said that he did, he offered to pay Vigo to kill his wife. Correa then applied eye makeup to his face and climbed into bed. Later that evening, Correa's relatives arranged to have Correa forcibly transferred to a rehabilitation clinic, where he stayed until November 2013.

After Correa left the clinic, he moved to his parents' house in the La Molina district of Lima. Every day, Correa called Velarde's parents' home, where he believed Velarde and the Children were staying, but was repeatedly told that they were not home. He received the same response when he visited in person. Correa even asked one of his employees, Bisso, to walk the beach near Velarde's parents' beach house to see if he could find them. Correa also wrote a series of notarized letters to Velarde asking to visit the Children and, when the letters were returned to him, to her parents asking for the Children's whereabouts. On February 2, 2014, Correa filed a police complaint in order to have an officer go to Velarde's parents' residence to ask for the Children. During this time frame, Velarde and the Children were staying at a "safe house" rented by Velarde outside Lima. Even though she was apparently in hiding, she filed a series of police complaints alleging that Correa was not making efforts to see the Children.

In the meantime, Correa continued to pay the Children's health insurance and private school tuition, even though they had not been attending school. He emailed the school to see if the Children had transferred elsewhere. On February 20, 2014, Velarde took the Children to the United States. She did not inform Correa. He was not aware that Velarde left the country with the Children until June 2014, when he was notified after she had applied for an order recognizing her custody rights over the Children in the Circuit Court for Montgomery County, Maryland.

While Velarde and the Children were in Maryland, Correa sought to enlist the Peruvian legal system to assist in regaining custody of the children. On October 1, 2014, the Court of Appeals for Lima with jurisdiction over family matters granted Correa's appeal of an earlier Family Court decision and granted him temporary custody of the Children. Correa also filed a complaint seeking criminal charges against Velarde for leaving the country with the Children

without his permission. Although the complaint was initially dismissed, a Peruvian appellate court reinstated the complaint on January 9, 2015, allowing the investigation to proceed.

Vigo testified that, during this period, he heard Correa directing his attorney to "not hold back" and to "go ahead and pay whatever amount of bribe was needed." Vigo Test. (Direct) 27:19–20, Apr. 23, 2015. Vigo took photographs of pages of Correa's payment ledger, which contains entries for payments for items such as "secretaries of the 10th Family Court of Lima," for "revocation of injunction in Family Court," and "for arranging criminal and family courts." Trial Ex. 120, at 133, 134, 137.

In January 2015, the Montgomery County Circuit Court granted Correa supervised visitation sessions with the Children three days a week. On January 27, 2015, in Maryland, Correa saw the Children for the first time since they were returned to Velarde in October 2013. The Children were initially apprehensive but eventually warmed up to their father. They have been meeting regularly since January 2015, and the Children have not exhibited any fear or anxiety toward Correa during the supervised visitations. While in the United States, Velarde had the Children evaluated by Dr. Munson, a licensed clinical social worker and professor at the University of Maryland School of Social Work, who diagnosed J.G.C.V. with severe post-traumatic stress disorder and persistent depressive disorder. He diagnosed R.G.C.V. with severe anxiety disorder and reached a "rule out" finding of post-traumatic stress disorder and persistent depressive order, which means that he believes there is a likelihood that R.G.C.V. has these disorders. Both of the Children were diagnosed with separation anxiety disorder, through which the Children are at risk of being distressed if separated from Velarde. Dr. Munson concluded that removing the Children from Velarde and returning them to their father in Peru would present a "grave risk" of psychological harm. Dr. Munson Test. (Direct) 135:20–136:9, Apr. 23, 2015.

In the same time frame, Dr. Lefkowits evaluated Correa in the United States. He concluded that Correa's alcohol abuse was in a sustained remission and that Correa otherwise had no other diagnosable disorders, but found a likelihood ("rule out") of adjustment disorder with mixed depression. Dr. Lefkowits noted, however, that Correa's responses during the evaluation were "mildly to moderately defensive," reflected in part by a computerized test result indicating that Correa's responses indicated "an extreme attempt . . . to present himself as being free of psychological problems in order to influence the outcome of the custody evaluation." Dr. Lefkowits Test. (Cross) 13:9–15, Apr. 24, 2015. Dr. Munson testified that such defensiveness occurs when someone tries to fake a positive impression or presents an overly positive picture of himself and his functioning.

DISCUSSION

I. Legal Standard

The Hague Convention, to which the United States and Peru are signatory parties, is a multilateral treaty designed "to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and . . . to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention art. 1. It is meant "to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court." *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir. 2001) (citation and internal quotation marks omitted).

The United States has implemented the Hague Convention by statute in ICARA. To secure the return of an abducted child under ICARA, a petitioner must prove, by a preponderance of the evidence, that the child was "wrongfully removed" under the meaning of the Hague Convention. 22 U.S.C. § 9003(e)(1)(A). If the petitioner establishes wrongful

removal, the respondent must return the child unless the respondent can show that an exception applies under the Hague Convention. *See Miller*, 240 F.3d at 398. Here, Velarde asserts that three exceptions apply. The first exception, which must be established by a preponderance of the evidence, is that the petitioner "was not actually exercising the custody rights at the time of removal." Hague Convention art. 13(a), 19 I.L.M. at 1502. The second, under Article 13(b) of the Hague Convention, is that there is a "grave risk" that return would expose the Children to "physical or psychological harm or otherwise place [the Children] in an intolerable situation." Hague Convention art. 13(b), 19 I.L.M. at 1502. The third, under Article 20, is that the return "would not be permitted by the fundamental principles of the [United States] relating to the protection of human rights and fundamental freedoms." *Id.*, art. 20, 19 I.L.M. at 1503. The Article 13(b) and Article 20 exceptions must be shown by clear and convincing evidence. *Miller*, 240 F.3d at 398.

II. Wrongful Removal

Removal is "wrongful" under the Hague Convention where: (1) the child was "habitually resident" in the petitioner's country of residence at the time of removal, (2) the removal violated the petitioner's custody rights under the law of the home country, and (3) the petitioner had been exercising those rights at the time of removal. *Bader v. Kramer* (*Bader II*), 484 F.3d 666, 668 (4th Cir. 2007) (citation omitted). The parties do not dispute that the Children were habitually resident in Peru and that Velarde removed the Children from Peru on February 20, 2014. At issue here is whether Correa had custody rights under Peruvian law following the issuance of the Peruvian court orders requiring him to return the Children to Velarde in October 2013, and whether Correa was exercising those rights at the time of removal. Based on the evidence

presented at trial, the Court concludes that Correa had custody rights and was exercising those rights at the time of removal.

A. Custody Rights

The Hague Convention defines custody rights as the "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Hague Convention art. 5(a). The analysis is based on the custody status at the time of the alleged wrongful removal. *See White v. White*, 718 F.3d 300, 307 (4th Cir. 2013); *Miller*, 240 F.3d at 401. The Court heard expert testimony on Peruvian family law from Bustamante, who stated that, at the moment a child is born, Peruvian law grants each biological parent custody rights in the form of *patria potestas*. This Roman law concept, which originally referred to the absolute authority of the father over his child, generally refers to the rights of both biological parents to exercise authority over their children. *See Whallon v. Lynn*, 230 F.3d 450, 456–57 (1st Cir. 2000). *Patria potestas* is codified in Peruvian law under the term "parental authority," which is defined as the right and duty of the parents to take care of the person and property of their minor children. Civil Code of Peru § 418.[4] In addition to providing rights and duties relating to the development, education, and assets of a child, parental authority gives parents the right to "[k]eep the children with them and appeal to the proper authority in order to recover them," which necessarily implies rights relating to the child's residence. Code of Children and Adolescents of Peru art. 74(e). Such *patria potestas* rights, which Correa received when the

[4] In addition to the testimony presented during the bench trial by Bustamante, the parties submitted translations of Peruvian civil and family law as attachments to the Petition, as part of Bustamante's expert report referenced at trial, and as an exhibit admitted during the bench trial. Although not all of these documents were formally admitted at trial, the Court may consider them in determining Peruvian law. *See* Fed. R. Civ. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.").

Children were born, are recognized as "rights of custody" within the meaning of the Hague Convention. *See Whallon*, 230 F.3d at 459 (holding that *patria potestas* rights under Mexican law are custody rights under the Hague Convention). *Cf. Bader v. Kramer*, 445 F.3d 346, 350 (4th Cir. 2006) (holding that German law presumptively confers joint custody upon both parents until a court enters a contrary order).

During a marriage, the parents jointly exercise parental authority. Civil Code of Peru § 419. The Code of Children and Adolescents of Peru, which is distinct from the Civil Code, outlines the circumstances under which parental authority can be suspended. Although parental authority may be suspended if the parents separate and divorce, Code of Children and Adolescents of Peru art. 75(g), "[i]n cases of conventional separation and subsequent divorce, neither father or mother is suspended its parental authority." *Id.* art. 76. Bustamante testified that, in such instances, parental authority can only be suspended through a legal proceeding and with a court order that expressly suspends those rights. Although Velarde and Correa had separated, no judge had ordered the suspension of either party's parental authority over the Children at the time of removal. *See Bader v. Kramer* (*Bader I*), 445 F.3d 346, 351 (4th Cir. 2006) (concluding that a father seeking the return of his daughter retained joint custody rights "because no competent German court has entered an order granting [the mother] sole custody"). *Cf. Fawcett v. McRoberts*, 326 F.3d 491, 499 (4th Cir. 2003) (holding that when a Scottish court issued a decree modifying parental rights and rescinding the right to determine the child's residence, the parent had no custody rights under the Hague Convention), *abrogated on other grounds by Abbott v. Abbott*, 560 U.S. 1 (2010).

Velarde argues that the *habeas corpus* and *no innovar* orders extinguished Correa's parental authority rights. That argument is unpersuasive. The original *habeas corpus* order

issued by the Tenth Criminal Court of Peru directed Correa "to immediately stop preventing [Velarde] from fully exercising her parent authority," and ordered him to allow Velarde to have regular contact with the Children. Trial Ex. 7, at 200. That order recognized that both parents had parental authority and directed one – Correa – to stop interfering with the rights of the other – Velarde. On appeal, the Court of Appeals of Lima affirmed and further required that "the situation be reinstated to its condition prior to the date on which the writ of habeas corpus was filed," meaning "when [the Children] were under the care of their mother." *Id.* at 206. The court ordered that Correa "immediately deliver" the Children to her. *Id.* at 207. But in effectively providing Velarde with temporary custody pending a final determination by the Family Court, the appellate order explicitly did not remove Correa's parental rights. Rather, it stated, "The orders do not imply any decision on who shall exercise parental authority, a fact that is being heard before another jurisdictional body, after the facts claimed herein." *Id.* at 206.

The *no innovar* order likewise failed to abrogate Correa's custody rights. In Peru, a *no innovar* order, similar to an injunction under American law, is primarily used "preserve the de facto or de jure situation." Trial Ex. 8, at 258. Here, Velarde had pursued relief in both the Family Court, where she sought an order of temporary custody, and the Criminal Court, where she sought the *habeas corpus* order. Once the *habeas corpus* order required the return of the Children to Velarde, such that she effectively had temporary custody, the Family Court issued the *no innovar* order as another means by which to "preserv[e] the de facto situation," but it explicitly referred to the order as "interim relief." *Id.* at 258–60. The court did not make any final determination on parental authority and noted that the custody proceeding was "currently in progress." *Id.* at 259. The habeas corpus and *no innovar* orders therefore did not extinguish Correa's parental authority.

Finally, in addition to *patria potestas* rights under Peru's parental authority law, Correa had an additional basis for custody rights under the Hague Convention because Peruvian law requires the authorization of both parents before a child may leave Peru. The Supreme Court of the United States has held that when a parent has the legal right to require that the other parent secure his or her consent to a child's removal from the country, known as a *ne exeat* right, such a right constitutes a custody right under the Hague Convention. *See Abbott v. Abbott*, 560 U.S. 1, 15–16 (2010). Under the Code of Children and Adolescents of Peru, "the notarial certified authorization of both parents is mandatorily required" for a child to travel abroad. Code of Children and Adolescents of Peru art. 111. As Bustamante testified, based on this provision, Velarde could not remove the Children without Correa's authorization or a court order. It therefore confers on Correa and other parents in Peru a *ne exeat* right, which in turn constitutes a right of custody under the Hague Convention. *Abbott*, 560 U.S. at 16. Thus, Correa unquestionably had custody rights at the time of removal.

B. Exercising Custody Rights

Article 3 of the Hague Convention requires the parent seeking relief to show that the custody rights "were actually exercised" at the time of removal. Hague Convention art. 3(b), 19 I.L.M. at 1501. Conversely, the opposing parent may defeat a Hague Convention petition by establishing by a preponderance of the evidence that the custody rights were not actually exercised at the time of removal. *Id.*, art. 13(a), 19 I.L.M. at 1502; 22 U.S.C. § 9003(e)(2)(B). Courts "liberally find 'exercise' whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child." *Bader II*, 484 F.3d at 671; *see also Walker v. Walker*, 701 F.3d 1110, 1121 (7th Cir. 2012); *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996). Under this approach, a parent with custody rights cannot fail to exercise

those rights short of "acts that constitute clear and unequivocal abandonment of the child." *Bader II*, 484 F.3d at 671 (quoting *Friedrich*, 78 F.3d at 1066) (internal quotation marks omitted). Courts have found "exercise" in cases where, in addition to paying child support, a father had physical custody of the child on at least three occasions during a three-month period, *see Bader II*, 484 F.3d at 671, and where a father kept in regular contact with his daughter over the telephone and via Skype and requested visitation rights and custody during vacations, *Walker*, 701 F.3d at 1121–22. The broad definition of "exercise" is necessary, in part, because a determination on the adequacy of one parent's exercise of custodial rights comes "dangerously close" to the merits of the custody dispute, which the Hague Convention forbids a court from deciding. *Friedrich*, 78 F.3d at 1065.

In this case, there is ample evidence that Correa was exercising his custody rights at the time of removal on February 20, 2014. He had physical custody of the Children from June 17 to October 29, 2013, and he relinquished them to Velarde only when required by a court order. After the Children went back to Velarde, Correa called her every day to seek access to the Children, personally went to the house where he believed they were living to ask to see the Children, and sent Velarde and her parents multiple notarized letters requesting visitation and information on the Children's whereabouts. He emailed the Children's school to determine whether they had transferred to another school, and he sent a member of his personal staff to the beach near their neighborhood to see if they were there. When he could not find them, he filed a police complaint and arranged for a police officer to go to Velarde's parents' house to ask for the Children. Throughout this time, he continued to pay the Children's health insurance and school tuition even though the Children had stopped attending, so that they would not lose their placements at the school. The persistence with which Correa pursued his Children over several

months, despite not knowing their whereabouts, in no way supports a conclusion that Correa clearly and unequivocally intended to abandon his custody rights. Correa therefore was exercising his rights at the time of removal, and he has established a wrongful removal under the Hague Convention. At the same time, these facts demonstrate that Velarde has failed to establish the exception, under Article 13(a) of the Convention, for failure to exercise custody rights.

III. Article 13(b)

A. Grave Risk

Even where wrongful removal has been established, under Article 13(b) of the Hague Convention, the Court "is not bound to order the return of the child" if the respondent can establish that "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." Hague Convention art. 13(b), 19 I.L.M. at 1502. The respondent must demonstrate that this exception applies by clear and convincing evidence. 22 U.S.C. § 9003(e)(2)(A). To avoid circumventing the underlying purpose of the Hague Convention, this exception must be construed narrowly. *Simcox v. Simcox*, 511 F.3d 594, 604 (6th Cir. 2007). The narrow construction, however, should not give way to "the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." *Id.* (citation and internal quotation marks omitted).

Although there is no clear definition of what constitutes "grave risk," the respondent "must show that the risk to the child is grave, not merely serious." *Friedrich*, 78 F.3d at 1068. The risk must be more than the trauma associated with uprooting and moving the child back to the country of habitual residence. *See id.* at 1068 ("A removing parent must not be allowed to abduct a child and then – when brought to court – complain that the child has grown used to the

surroundings to which they were abducted."); *see also Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000) ("[T]he harm must be something greater than would normally be expected on taking a child away from one parent and passing him to another." (citation and internal quotation marks omitted)).

Domestic abuse can provide a basis for a finding of grave risk. Certainly, sexual abuse of the child would constitute a grave risk of placing the child in an intolerable situation. *See Hague International Child Abduction Convention; Text and Legal Analysis*, U.S. Department of State, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986) ("An example of an 'intolerable situation' is one in which a custodial parent sexually abuses the child."); *Simcox*, 511 F.3d at 606 (stating that the State Department's comments on the Hague Convention are afforded "great weight"). Significant physical and verbal abuse of a spouse and child can also establish a grave risk. *See, e.g., Simcox*, 511 F.3d at 598–99, 608–09 (finding grave risk arising from the father's verbal and physical abuse of the mother in the children's presence, as well as "frequent episodes of belt-whipping, spanking, hitting, yelling and screaming, and pulling [of] hair and ears" against the children); *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005) (finding evidence of grave risk sufficient to deny summary judgment where the father frequently and seriously beat, kicked, and choked the mother, verbally abused her, struck the child on several occasions, and threatened to kill the mother and the children).

Courts have found grave risk based on domestic abuse of the spouse in the presence of the children, even without abuse directed at the children themselves. In *Walsh*, the court found grave risk based on a long history of the father physically beating the mother, including in front of the children, as well as a history of fighting others, threatening to kill another, and a history of violating court orders. *Walsh*, 221 F.3d at 211, 219–20. Likewise, in *Baran v. Beaty*, 526 F.3d

1340, 1345–46 (11th Cir. 2008), the United States Court of Appeals for the Eleventh Circuit found grave risk where the father had verbally and physically abused the mother in the child's presence, and threatened to harm the child, but did not physically abuse the child. *Id.* at 1346. In such cases, courts have noted the psychological harm inflicted on the child witnessing the abuse of the parent and the increased risk that the child would be similarly abused. *See, e.g.*, *Walsh*, 221 F.3d at 220 (noting that "children are at an increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser").

Not every case involving abuse, however, presents a grave risk. In *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000), the court did not find grave risk where the father verbally abused the mother and an older child and, on one occasion, shoved the mother and threw a rock at her car, but did not physically or psychologically abuse the child at issue on the petition. *Id.* at 453, 460. Similarly, in *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995), the father's physical, sexual, and verbal abuse of the mother was not enough to constitute grave risk where there was no evidence that the father abused the six-month-old child, since grave risk is concerned with whether the child would suffer upon return, not the parent. *Id.* at 376-77.

In this case, there is very little evidence that Correa physically abused Velarde or the Children – the only such instance being when Correa threw a book at J.G.C.V. for getting poor grades. Although physical abuse was present in the leading cases on grave risk, the Hague Convention specifically provides that the grave risk can be of "physical *or* psychological harm." Hague Convention art. 13(b), 19 I.L.M. at 1502 (emphasis added). Here, there was significant and unusual psychological abuse of both Velarde and the Children. Correa regularly made threats and verbally abusive statements to Velarde over a several-year period. Among the many examples, Correa called Velarde a "bitch," a "prostitute," and a "whore," often in the presence of

the Children. After the separation, Correa wrote abusive emails and made at least one abusive phone call to Velarde in which he repeatedly called Velarde, her father, and her mother a variety of profane names such as "bitch," "whore," "bastard," and "son of bastard bitch." *See, e.g.*, Trial Ex. 114. On one notable occasion outside the family home, Correa shouted to Velarde, in the presence of the Children and loud enough for the neighbors to hear, that she was a "masturbator of kids" and that she "stuck her finger in the ass of the boy." Trial 10:20:00 (Apr. 24, 2015). Such verbal abuse has been a contributing factor to a finding of grave risk. *See, e.g.*, *Simcox*, 411 F.3 at 599 (considering calling mother vulgar names in front of the children as part of the grave risk analysis); *Van de Sande*, 431 F.3d at 569 (same).

Significantly, unlike in *Simcox*, *Van De Sande*, *Walsh*, or *Baran*, the Children not only heard some of Correa's verbal abuse of their mother, they were the direct recipients of it, and even more troubling, they were coerced into delivering sexually explicit insults and accusations directly to their mother and others. When Correa had the Children living with him after the separation, he told the Children that their mother was a "prostitute," that she "wanted the penis to be stuck in her vagina and your grandmother is like that, too" and that "your mother has stuck her finger in your ass." Vigo Test. (Direct) 78:20–21, Apr. 21, 2015. Correa coached the Children to tell social workers that Velarde had touched him inappropriately.

On at least one occasion, Correa directed R.G.C.V. to call his mother a "dog" or a "bitch" over the telephone. Vigo Test. (Direct) 75:7–15, 77:12–15, Apr. 21, 2015; *see Van de Sande*, 431 F.3d at 569 (father told child to call her mother an obscenity). When he struggled to say the words, Correa ordered him to "tell her." Vigo Test. (Direct) 75:14, Apr. 21, 2015. On another occasion, he dictated to J.G.C.V. a message to Velarde, that the child wrote, stating that she had raped him, that her father is a "drunkard," that her mother is a "deceitful whore," that the

Children both "hate" her. Correa also forced him to write that Correa would rather "kill himself," and that the Children "would rather die and go to Heaven as angels with uncle Guillermo," than have them go back to living with her. Vigo Test. (Direct) 17:22–25, Apr. 23, 2015. Both the act of compelling children to abuse their mother verbally and the reckless exposure of the Children to inappropriate sexual concepts at a young age take Correa's psychological abuse to a level beyond what is typically seen in grave risk cases.

Correa also repeatedly threatened to kill or harm Velarde. Prior to the separation, he threatened to cut her face and "destroy" her, he stuck a knife in a table as a threat to her, and he told her directly that she "would live with a bullet in her head." Trial 10:09:30 (Apr. 24, 2015). After the separation, he threatened to kill Velarde's parents in a verbal tirade over the telephone. He then offered to pay Vigo to shoot Velarde when she arrived to get physical custody of the Children in October 2013. Because Correa owned a handgun, and Vigo carried a weapon for his security duties, there was more than an abstract chance that Correa would eventually follow through on such threats. Even more troubling, Correa communicated his threats directly to the Children, even when their mother was not present, by bending a fork and stating that he would do the same to her, by telling them that he would use a Taser on her, and telling them that he would buy a silencer for his gun to use against their mother.

Of greatest concern was Correa's threat to harm the Children. Prior to the separation, he threatened to Velarde that he would kill himself and the Children "if things go wrong." Trial 10:04:55 (Apr. 24, 2015). Later, he directly told the Children, "I will kill you both and then I will kill myself and we will all go together to heaven" with their late uncle. Vigo Test. (Direct) 4:25–85:3, Apr. 21, 2015. This same scenario was referenced in the letter that J.G.C.V. was forced to write to his mother. Certainly, threats to kill the spouse, the child, or third parties are

significant factors in considering grave risk. *See, e.g.*, *Van De Sande*, 431 F.3d at 569 (finding grave risk where the father threatened to kill the children, kill the mother, and then kill "everybody"); *Walsh*, 221 F.3d at 209 (finding grave risk where the father was criminally charged with threatening to kill a neighbor); *Blondin v. Dubois*, 189 F.3d 240, 243 (2d Cir. 1999) (finding grave risk where the father twisted an electrical cord around the child's neck and threatened to kill the mother and child).

The gravity of these threats is heightened when viewed in the context of Correa's history of psychological and substance abuse issues. For several years, he drank alcohol excessively while taking prescription medications. Correa received psychiatric treatment from 2008 to 2010, saw a psychiatrist after Velarde left with the Children in 2012, then went to a rehabilitation facility after the Children returned to Velarde in October 2013. During this time period, he made several unsettling references to suicide and death. He expressed thoughts of suicide on multiple occasions, dating as far back as 2008 when Velarde found a note on their bed from Correa asking that he be buried in a handpicked suit, to 2012 when he threatened to throw himself from the fifth floor window, to the yearlong period when he threatened on more than one occasion to *kill* himself and the Children. He also unnecessarily and callously told R.G.C.V. that he was going to die from a fever. In an email dated June 19, 2013, Correa strangely indicated that he had received revelations of the impending death of family members of Velarde's friend, including the means by which they would die (a car accident, a heart problem, and cancer).

Thus, although this case involves little or no physical abuse, the magnitude of the psychological abuse is unique. The Children were not merely present during verbal abuse of their mother. They were subjected to direct statements from their father denigrating or threatening their mother, were forced to engage in verbal abuse of their mother, were required to

hear and repeat sexually explicit statements about their mother and her conduct, and they were directly threatened by their father with possible death. Dr. Munson diagnosed J.G.C.V. with severe post-traumatic stress disorder and persistent depressive disorder and found it likely (through a "rule out" determination) that R.G.C.V. also suffers from these conditions. Both have separation anxiety disorder. He opined that return of the Children to the father in Peru would present a grave risk of harm.

Viewed as a whole, the abuse of the Children here is at least as severe as that found in *Baran*, where the father had a history of a violent temper and alcohol abuse and there was repeated physical abuse of the mother, sometimes in the child's presence, as well as a threat to hurt the child, but there was no direct abuse of the child. *See Baran*, 526 F.3d at 1346. It is comparable to the abuse of the child in *Blondin*, where grave risk was found based on physical abuse of the mother in the child's presence and threats to kill the child, including with an electrical cord placed around her neck. *See Blondin*, 189 F.3d at 242–43. It is also significantly worse than the abuse in *Whallon* and *Nunez-Escudero*, where there was no grave risk found because there was little or no harm inflicted upon or in the presence of the child. *See Whallon*, 230 F.3d at 452–53, 460; *Nunez-Escudero*, 58 F.3d at 377. Thus, the Court finds that unless the situation has dramatically changed, there would be a grave risk of harm to the Children if they were returned to their father in Peru.

Correa claims that he stopped drinking on October 29, 2013, when Velarde took the Children back, and that he has been sober ever since. He testified that he had done a lot of harm to Velarde and the Children, he was ashamed to see his behavior laid out in such detail during the hearing, and he was deeply sorry for what he had done. Dr. Lefkowits, who evaluated Correa, did not diagnose him with any psychological disorder and concluded that his alcohol

abuse is in remission. Nevertheless, the Court cannot safely conclude that Correa's abusive conduct is in the past. First, as noted previously, Correa's testimony was internally inconsistent and defiant at times, such as when he denied past psychiatric treatment, and he did not present a uniform picture of someone who has acknowledged and corrected past misbehavior. Second, Dr. Leftkowits' evaluation was based on the information provided by Correa. Notably, Correa failed to inform Dr. Leftkowits that he had entered an in-patient rehabilitation center in 2013, that he had received prior psychiatric treatment, and that he had taken various medications. He did not tell Dr. Lefkowits that he had made threats to Velarde and the Children, such as the threat that Velarde would live with a "bullet in her head," which Correa has now admitted. Dr. Leftkowits appeared visibly surprised when presented with some of these facts. Moreover, both Dr. Munson and Dr. Lefkowits noted that the computerized analysis of Correa's raw test data gave indications that Correa may have presented himself as "being free of psychological problems in order to influence the outcome of the custody evaluation." Dr. Munson Test. (Direct) 24:17–22, Apr. 24, 2015; Dr. Lefkowits Test. (Cross) 13:9–15, Apr. 24, 2015. Finally, it is noteworthy that Correa has asserted once before, in an April 2013 email to Velarde, that he had been sober for a period of several months, only to continue abusing alcohol through at least October 2013.

Correa also points to the generally positive visitation sessions he has had with the Children in conjunction with the state court proceedings. These monitored sessions, however, do not provide a clear picture of how he would interact with the Children upon return to Peru. At present, in Peru, Correa would have temporary custody of the Children under the October 1, 2014 appeals court ruling, and there is currently a criminal complaint in Peru against Velarde, initiated by Correa, for removing the Children from Peru. Thus, upon return, the Children would likely reside with him, in the prior family residence, with final custody yet to be determined.

The situation would therefore be exactly the same as it was from June to October 2013, when Correa privately sought to manipulate the Children to build a case for permanent custody through accusations that Velarde neglected the Children and sexually abused them. It also presents the possibility that, if the Peruvian courts rule against him on permanent custody, Correa would be faced with the choice whether to relinquish the Children again, or carry out his prior threat that he would kill himself and the Children rather than lose them. Although it may be that Correa is fully rehabilitated and would not consider such drastic measures, the Court is mindful that the gravity of a risk not only involves the probability of the harm, "but also the magnitude of the harm if the probability materializes." *Van De Sande*, 431 F.3d at 570.

Other considerations give the Court further pause. During the time period after the Children were returned to Velarde, Correa was heard directing his attorney to "go ahead and pay whatever amount of bribe was needed" in relation to the legal proceedings on custody. A ledger of payments contains entries that could be read as relating to bribes.[5] This evidence is consistent with his earlier email statement to Velarde: "Thank God this world is moved by money." Trial Ex. 108, at 295. To the extent that there are indications that Correa is not committed to allowing the Peruvian legal system to resolve the custody dispute without inappropriate manipulation, it raises concerns whether that system will be able to protect the Children adequately. *Cf. Walsh*, 221 F.3d at 211 (finding that the father's propensity to disregard court orders increases the risk of harm to the child).

Based on all of these factors, the Court finds that there is clear and convincing evidence to support Velarde's argument for a grave risk exception. Because of the quantity and severity

[5] Because the testimony at trial and the ledger itself do not provide a clear basis to distinguish the legitimate payment of legal fees or court costs from illegal bribes, the Court declines to find specifically that the ledger conclusively establishes that Correa bribed government officials.

of psychological abuse that the Children witnessed, received, and were compelled to inflict on their mother, the Court finds that there is a grave risk that returning the Children to their father in Peru during the pendency of the custody proceedings would expose them to psychological harm or otherwise place them in an intolerable situation.

B. Undertakings

Where there is a finding of grave risk, courts are "not bound to order the return of the child." Hague Convention art. 13(b), 19 I.L.M. at 1502. Courts may nevertheless return a child if sufficient protection is afforded. *Simcox*, 511 F.3d at 605. To mitigate the risk, courts may impose a set of enforceable conditions on the return, known as "undertakings." "The undertakings approach allows courts to conduct an evaluation of the placement options and legal safeguards in the country of habitual residence to preserve the child's safety while the courts of that country have the opportunity to determine custody of the children within the physical boundaries of their jurisdiction." *Walsh*, 221 F.3d at 219. Undertakings may "accommodate [both] the interest in the child's welfare [and] the interests of the country of the child's habitual residence." *Van de Sande*, 431 F.3d at 571-72.

In offering guidance on the use of undertakings, the United States Department of State (the "State Department") has advised that they be narrowly drawn:

> Undertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence, so that the jurisdiction can resolve the custody dispute. Undertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance.

Danaipour v. McLarey, 286 F.3d 1, 22 (1st Cir. 2002) (quoting Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995) ("Brown Letter")). A court "must recognize the limits on its authority and must focus on the particular

situation of the child in question in order to determine if the undertakings will suffice to protect the child." *Id.* at 21. A court cannot require a parent to return to the country, nor can it require a foreign court or jurisdiction to enter a new order to enforce the undertakings. *See Simcox*, 511 F.3d at 610 (finding undertakings flawed because the mother cannot be forced to return and there were doubts as to the father's willingness to abide by the undertakings); *Danaipour*, 286 F.3d at 25 (concluding, in a case with credible sexual abuse allegations, that the district court had no authority to order a forensic evaluation in Sweden or to order the Swedish courts to consider the evaluation in the custody dispute). Undertakings are thus most effective when used only to preserve the status quo at the time prior to the wrongful removal. *Simcox*, 511 F.3d at 607.

The State Department has cautioned against using undertakings when one parent is protecting the child from abuse:

> If the requested state court is presented with unequivocal evidence that return would cause the child a "grave risk" of physical or psychological harm, however, then it would seem less appropriate for the court to enter extensive undertakings than to deny the return request. The development of extensive undertakings in such a context could embroil the court in the merits of the underlying custody issues and would tend to dilute the force of the Article 13(b) exception.

Danaipour, 286 F.3d at 25 (quoting the Brown Letter). Nevertheless, even where a district court has found grave risk arising from physical or psychological abuse, several Courts of Appeals have required district courts to consider undertakings prior to denying a petition. *See, e.g.*, *Simcox*, 511 F.3d at 610–11 (remanding for assessment of whether undertakings could be fashioned to allow for return); *Blondin*, 189 F.3d at 249–50 (after affirming finding of grave risk, remanding for consideration whether arrangements could be made with a third party custodian to allow for repatriation). *But see Baran*, 526 F.3d at 1351–52 (holding that upon a finding of grave risk the district court did not have to consider undertakings).

Although this case involves domestic abuse creating a grave risk of psychological harm to the Children, there is nevertheless a realistic possibility of return with undertakings. First, although the Court has found grave risk, particularly given the absence of sexual abuse or physical violence, the abuse is not so extreme as to foreclose the possibility of return with undertakings. *See Simcox*, 511 F.3d at 607–08 (distinguishing between extreme abuse, for which undertakings should not be considered, and "cases that fall somewhere in the middle," where undertakings could be considered). Second, unlike in many domestic violence cases, a return to the status quo before the removal would not necessarily return the Children to the abusive environment. Here, immediately prior to the removal, the Children were in the temporary custody of Velarde, at a location away from Correa and the original family home. Dr. Munson's opinion on grave risk was focused on the scenario of returning the Children "to their father in Peru," and he did not opine that the Children's presence in Peru in general would affirmatively trigger psychological harm. Dr. Munson Test. (Direct) 135:20–136:9, Apr. 23, 2015.

Third, because Velarde is Peruvian and her parents reside there, this case does not involve the scenario under which returning the children would, as a practical matter, require that the removing parent and children return to an abusive home and seek to navigate a court system foreign to them. *See, e.g.*, *Blondin*, 189 F.3d at 249 (reversing district court's denial of undertakings even though the district court found that the mother's circumstances would necessarily have required her and the child to return to the father's home); *Baran*, 526 F.3d at 1344, 1352 (rejecting proposed undertaking that the child and the mother, an American citizen, return to Australia to live in the abuser's home or the abuser's sister's home). During the two periods when Velarde had custody of the Children in Peru, immediately following the separation (December 2012 to June 2013) and immediately prior to the removal (October 2013 to February

2014), it was demonstrated that Velarde and her family have both the support network and financial resources to care for the Children away from Correa. At various times they stayed at Velarde's parents' home, Velarde's parents' beach house, and a "safe house" rented by Velarde. Even if Velarde were to choose not to return, the Children presumably could stay with their maternal grandparents.

Moreover, Velarde and her family have demonstrated that they have the resources and sophistication to litigate the custody proceedings in the Peruvian courts to their resolution. Prior to her departure from Peru, Velarde had retained an attorney and had vigorously litigated the custody dispute. Just as Correa had engaged in dubious tactics such as sending notarized letters claiming that Velarde was neglecting the Children by not visiting them at his house, Velarde engaged in similar tactics by filing at least six police complaints alleging that Correa had not attempted to visit the Children, at a time when she had taken the Children to a "safe house" to avoid contact with him. Then when Vigo approached Velarde's family with relevant information, the Velardes had the resources to pay for an attorney for Vigo and to hire him as an employee for the duration of the custody proceedings in order to ensure his availability to testify. Although there is some evidence that Correa has sought to use his family's financial resources to influence the outcome of the proceedings, the reality is that up until her departure, Velarde, not Correa, had prevailed at each stage of the *habeas corpus* proceedings, had obtained the *no innovar* order, and had thus secured temporary custody.

Finally, based on the series of visitation sessions in Maryland between Correa and the Children since January 2015, there is reason to believe that supervised visitation in Peru, if ordered by a Peruvian court during the pendency of custody proceedings, would not jeopardize the Children's safety. Thus, a return to the status quo immediately prior to the removal appears

to be a viable scenario that would accomplish both the return of the Children in compliance with the Hague Convention and the safety of the Children. In his submission on undertakings, Correa proposed such a plan. He would agree to have the Children return to Peru and remain in the custody of Velarde or her designee, at her parents' home or some other suitable residence. He has agreed to pay relocation expenses and living expenses for the duration of the custody proceedings.

The problem is that, because of Correa's post-removal litigation activities, the current legal landscape in Peru is incompatible with this return scenario. At the present time, Correa has a temporary custody order, entered in October 2014, and there is currently a criminal investigation, complaint, or charge against Velarde for leaving Peru with the Children without his consent. No order of this Court can supersede the existing temporary custody order in favor of Correa or prevent criminal charges from proceeding against Velarde. So upon return, Correa would have custody of the Children under Peruvian law, and if Velarde were to return with the Children and be arrested on criminal charges, the likelihood that the Children would be sent to live with Correa during the pendency of custody proceedings would increase.

Although Correa has proposed that he would promise not to seek enforcement of the Peruvian temporary custody order and would abstain from participating in the criminal proceedings as an aggrieved party, because undertakings are generally not enforceable in the country of habitual residence, no promise or agreement made by Correa before this Court could be enforced in Peru.[6] Given this reality, the current proposal is inadequate. *See Simcox*, 511

[6] Correa has also proposed as an undertaking that he would agree to refrain from seeking to pursue criminal charges against Velarde in the United States for immigration violations. The fact that he has apparently been considering such an action creates an additional cause for concern relating to the return of the Children, as it indicates an intention to continue to pursue

F.3d at 606 (stating that the party offering the undertakings bears the burden of proof on their effectiveness).

If, however, Correa can arrange to have the temporary custody order vacated, so that the underlying temporary custody order in favor of Velarde is reinstated, and if he can arrange to have the criminal charges against Velarde dismissed or the investigation closed, the legal landscape would return to the status quo at the time of the removal. Although there is uncertainty whether such steps can be arranged, the fact that Correa initiated those proceedings suggests that it is possible. At that point, the Court would be prepared to order the return of the Children to Peru, at Correa's expense, to reside with Velarde, her parents, or another third party custodian designated by Velarde, at a location selected by Velarde, during the pendency of the custody proceedings. Any visitation or other arrangements for the time period during which the custody proceedings are pending would most appropriately be addressed by the Peruvian courts.

If these pre-conditions are met, the Children would be placed in an environment that has been previously shown to be safe, and the case would return to the status quo at the time of the wrongful removal. Although this arrangement does require some action to undo what Correa has wrought, it would advance international comity to a much greater degree than the alternative, which is to deny the Petition outright. If these pre-conditions cannot be met, the Court will not order the return of the Children, pursuant to Article 13(b).

IV. Article 20

Under Article 20 of the Hague Convention, the return of a child may be refused if the return "would not be permitted by the fundamental principles of the [United States] relating to the protection of human rights and fundamental freedoms." Hague Convention art. 20, 19 I.L.M.

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scorched earth tactics to eliminate the mother as a possible custodian during the pendency of the custody proceedings.

at 1503. This exception is "invoked on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process." *See Hague International Child Abduction Convention; Text and Legal Analysis*, U.S. Department of State, 51 Fed. Reg. at 10,510. This is an extremely high standard. Indeed, it appears that no American court has ever applied this exception. Regardless, for the reasons stated above in concluding that the Children may safely return under certain conditions, the Court finds that their return would not "shock the conscience" or be a violation of human rights or fundamental freedoms.

CONCLUSION

For the foregoing reasons, and as stated in a separate Order, the Petition is CONDITIONALLY GRANTED. Correa has shown by a preponderance of the evidence that Velarde wrongfully removed the Children from Peru. Velarde, however, has demonstrated by clear and convincing evidence that returning the Children will place them at grave risk of psychological harm. Nevertheless, the Court will order the return of the Children, provided that Correa provides proof within 30 days that the following pre-conditions, which would reinstate the status quo at the time of the wrongful removal, have been satisfied:

1. The October 2014 Peruvian appeals court order of temporary custody in favor of Correa has been vacated, and the underlying temporary custody order in favor of Velarde has been reinstated;
2. All pending criminal complaints, investigations, or charges in Peru against Velarde, initiated by or with the assistance of Correa, have been dismissed or closed; and
3. Correa agrees in writing to the undertakings listed in the accompanying Order.

If these pre-conditions are satisfied, the Court will issue a Final Order certifying that the pre-conditions have been met, mandating compliance with the listed undertakings, and ordering the return of the Children to Peru.

Date: May 20, 2015

THEODORE D. CHUANG
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

GUSTAVO CORREA SABOGAL,

Petitioner,

v.

MARISA JULIA PAULA VELARDE,

Respondent.

Civil Action No. TDC-15-0448

ORDER

On February 17, 2015, Petitioner Gustavo Correa Sabogal ("Correa") filed a Petition, ECF No. 1, under the Hague Convention on the Civil Aspects of International Child Abduction against Respondent Marisa Julia Paula Velarde ("Velarde"), seeking the return of their two minor children, J.G.C.V. and R.G.C.V. (the "Children"), to their native country of Peru from the United States. For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

The Petition is CONDITIONALLY GRANTED. The Court will order the return of the Children to Peru, provided that Correa provides proof within 30 days that the following pre-conditions, which would reinstate the status quo at the time of the wrongful removal, have been satisfied:

1. The October 2014 Peruvian appeals court order of temporary custody in favor of Correa has been vacated, and the underlying temporary custody order in favor of Velarde has been reinstated;

2. All pending criminal complaints, investigations, or charges in Peru against Velarde, initiated by or with the assistance of Correa, have been dismissed or closed; and

3. Correa agrees in writing to the following undertakings:

   a. The Children will return to, and reside in, Peru in the custody of Velarde. If Velarde chooses not to return, the Children will return to, and reside in, Peru with a third-party custodian designated by Velarde, at a location in Peru designated by Velarde.

   b. Correa will pay all relocation costs for Velarde and the Children. Correa will also pay all living expenses of the Children, including any necessary expenses for therapy.

   c. Correa will refrain from initiating or supporting, directly or indirectly, any criminal or civil proceedings against Velarde, any member of Velarde's family, or Daniel Vigo Parra.

Upon proof that these pre-conditions are satisfied, the Court will issue a Final Order certifying that the pre-conditions have been met, mandating compliance with the listed undertakings, and ordering the return of the Children to Peru.

Date: May 20, 2015

/s/
THEODORE D. CHUANG
United States District Judge