**Guide to Good Practice – 13(1)(b) – Hague Conventions Conference – Capetown 2019**

When we have a multi-lateral international Convention such as the 1980 Child Abduction Convention, one of the one of the things that we strive for is that it be applied uniformly amongst the contracting States.

One of the areas where it has been proven to be most difficult in achieving uniformity is in the interpretation and application of Article 13(1)(b) (one of the exceptions to the obligation of court to order the return of a child to its habitual residence, where the court finds that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise expose the child to an intolerable situation.

- Explanatory Report of Professor Perez Vera - exceptions should be interpreted in a restrictive fashion, but case law was showing great discrepancies in how it was being interpreted and applied not only by the different countries, but sometimes by different jurisdictions within the same countries, often being interpreted very broadly.

Based on a recommendation of the Sixth Special Commission in 2012, the Council of General Affairs and Policy at its 2012 meeting decided to establish a Working Group made up of judges, CAs and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1(b) in order promote its proper and consistent application. Some of us here have been part of the working group. Since then there have been a number of meetings of the working group, a lot of work done between the meetings. PB has produced a number of drafts. It has been a complex and challenging task to draft the Guide, taking into account the different legal systems in the Contracting States, differences in practice.

Not yet in its final form - after the Council meeting in March 2019 it was decided to recirculate a revised draft for further comments by member States – further revisions will likely be made – hopefully within next few months or after next Council meeting it will be approved and published.

General overview of the Guide, its structure and general content. It's a document that should provide great assistance to judicial authorities , to whom it's primarily aimed, to CAs who often have a role in such cases, and to practitioners who handle such cases and others.

Guide offers information and guidance on the application of the grave risk exception, shares good practices taken from a variety of jurisdictions. Good practices, not binding, is advisory in nature, subject to national laws and procedures of the Contracting States. Not meant to direct the interpretation of 13(1)(b) in individual cases - that is for the courts to decide.

PART I – ARTICLE 13(1)(B) AS PART OF THE FRAMEWORK OF THE CONVENTION

Sets out framework of the Convention in general, as covered by Barbara, including for example that HC proceedings are summary in nature and that the court is to uses the most expeditious procedures available, and that there are limited exceptions to the obligation of the court to order the return of the child and that they are to be applied in a restrictive fashion.

With respect to the 13(1)(b) exception it stresses that:

* Focus is on grave risk to the child - there can be exceptional cases where physical or psychological harm to the taking parent on return could in some cases expose the child to grave risk – but normally we are focusing on GR to child
* Forward looking grave risk – Evidence of past behaviors and incidents in a case may prove that a grave risk exists, but the focus is on the circumstances upon return would expose the child to grave risk, and whether protective measures could be put into place to mitigate such a risk.

PART II – ARTICLE 13(1)(B) IN PRACTICE – guidance on how to analyze allegation of grave risk

* Many kinds of assertions of grave risk – physical, sexual or other abuse of the child, or the child's exposure to domestic violence by LBP to TP, separation from a parent or sibling due to return, severe concerns about circumstances in the state of habitual residence such as security, educational, health or financial,
* **Same analysis for grave risk is to be used, regardless of type of claim.No separate test or different standards.**
* Step 1) Court is to ask whether facts asserted of are sufficient detail and substance that they could constitute a grave risk that the return would expose the child to physical or psychological harm or otherwise place child in an intolerable situation
* If not, court orders return of the child. If yes:
* Step 2) Court evaluates the evidence and information produced, and asks:Has the person opposing the return (usually TP) satisfied the court that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, taking into account any adequate and effective measures available in the State of habitual residence to mitigate such GR.

- If not, court orders return. If Yes, the exception is established and the court is not bound to order return.

* *different approaches – some courts look at protective measures when determining whether there is a grave risk, some courts first focus on whether there is a grave risk and, if so, then look at protective measures. Some, to save time, look at whether there are protective measures available to address an asserted risk, and if so will order the return without entering into a more substantive evaluation of the allegations.*

Guide then sets out the kinds of claims that are often raised under 13(1)(b), going through the process to be followed in analyzing the alleged grave risk and determining whether there are protective measures that can mitigate the risk

* Drawn from practice, referenced in footnotes with cites of cases. Cases all appear on the INCADAT database. INVALUABLE TOOL, NB for countries to update database with important case law.

All claims use the same process

Example: Domestic violence – grave risk of harm to child as a result of abuse of the child' or child's exposure to DV by LBP against TP. Focus of GR analysis is the effect of violence on the child upon his/her return to State of HR. (ie not just whether there has been violence, but whether there will be a risk on return).

First step in analysis – are the facts asserted of sufficient detail and substance that they could constitute a grave risk of harm to the child if returned. Not just allegations. *Court might look at nature of violence, how often it happens, the circumstances in which it's likely to occur.* Eg. our case – mother alleged incidents in the past, before the children were born. Or a case where parent alleges domestic abuse but at the same time had been allowing LBP unsupervised ovemight visits (or where violence occurred in the past but after parents began living separately, there were no more incidents and LBP had had regular contact with children prior to abduction.)

Where Court evaluates evidence and determines that GR has been established, it should then consider the availability, adequacy and effectiveness of protective measures – *legal protection such as restraining orders, provision for separate housing for TP and child. (What services are available, both in terms of social welfare of police (shelters).This is where CA or liaison judge could possibly assist in getting info. EG of our CA – supplying info re legislation on prevention of family violence, how to get legal assistance to start court proceedings, get parent an expedited appointment, social services that are available (notify social services ahead of time,*

* TP could seek orders from courts of HR upon return, , or there may be a need to put them into place ahead of time, eg. restraining order. Court could order parent to fulfil a condition prior to ordering return – eg. proof of making separate housing available. If both states are parties to 1996 Convention, requested court could make orders of protection, and these would be recognized and enforceable in requesting state until that court takes jurisdiction. Use DJC, eg. to quickly schedule a case. In some cases courts have requested voluntary undertakings from LBP but these may not always be enforceable – unless they're enforceable they should be used with caution where DV is alleged.

SITUATION WHERE EXCEPTION MIGHT APPLY – no adequate or effective PMs, EG. PROOF OF INABILITY OF RESTRAINING ORDERS TO PROTECT PARENT IN PAST

Another eg.- where parent claims that s/he can't return with the child and therefore GR of harm due to separation of child. Focus is the effect on the child of a possible separation from the parent, and whether the effect meets the high threshold of the grave risk exception. Then look at PMs – eg, if LBP can care for child, meet child's needs until HR court can make a custody determination, . Or ensure regular access with TP. Could make a condition that the custody case be listed promptly in HR, and use DJC to possibly even arrange a hearing date. Parent could allege there are obstacles preventing return – court may want to look at measures that could address the obstacles preventing return. Eg. If parent says they don't have status to enter country, perhaps the CA can provide info about applying for entry for at least a short period pending custody proceedings – not looking for long-term relief. If parent says they could be subject to prosection and arrested, court might want info on this, CA could provide it. If parent says they can't afford a lawyer – clarify if they can apply for legal aid. USE CA's AND DJC WHERE RELEVANT. Often cases where TP just refuses but nothing is actually preventing return. OUTRIGHT REFUSAL TO RETURN IS GENERALLY NOT A BASIS

**III. GOOD PRACTICES FOR COURTS IN ARTICLE 13(1)(B) CASES**

These are recommended good practices, should only be used if permitted under the laws and procedures of the individual states and if considered by a court to be appropriate.

Key principle in this section is effective case management. It is crucial that the court be able to deal with assertions of grave risk in a highly focused and expeditious manner, and this requires strict case management.

Article 11 envisages a 6-week period from time of filing to time of decision. Cases where 13(1)B) is raised can become more complex, making it even more important for tight case management in order to avoid undue delays.

Guide suggests good practice for case management, including:

* Early identification of the relevant issues –It is up to the judge to narrow down the scope of the inquiry and limit the nature and type of evidence that will be adduced.
* Exploring the possibility of amicable resolution, whether mediation is appropriate
* Ensure that all parties have the opportunity to participate in the hearing and bring forth all relevant evidence and information without causing undue delay. Includes ensuring that LBP, who is normally situated in the country of HR, has opportunity to respond to any defences raised. Video conference if necessary. Set deadlines.
* Whether and how a child should be heard, whether child should have separate representation, and where child's views are to be obtained, that it be done in a timely manner without causing undue delay
* Expert evidence- determine if expert evidence is necessary and, if so, confine the nature and scope of the expert's evidence to the relevant issues, provide clear instructions explaining the limited scope of the return proceedings, **setting deadline** for providing evidence
* Court may be able to be assisted by CAs, for example in seeking information about the legal or child protection system in the state of HR, facilitating practical arrangements for the return
* It may be possible to use DJC, for example to get information about availability of protective measures. Eg how quickly could a hearing be scheduled.

**IV. GOOD PRACTICES FOR CENTRAL AUTHORITIES IN ARTICLE 13(1)(B) CASES**

Depends on CA's role – in some states the CA or an agent on its behalf initiates and conducts the proceedings. It may need to collect information to assist the court – this should be done in a timely manner without delaying the proceedings. In some states CA receives and reviews application but case is taken to court by private lawyers. **In either scenario, it is not the CA's role to evaluate the allegations – that is the court's job.**

In general, where requested and where possible under laws of its State, requested CA should provide information about laws and procedures in their own jurisdiction, provide information about availability of protective measures, including info on welfare and financial support systems, avenues to obtain protective measure and legal advice, how to obtain visa or refer to authority responsible for providing entry permits or visas

CA in requested state should inform other CA when exception is raised, advise immediately of any information requested by the court and the time frame for providing, notify other CA of any requirement for mirror orders, conditions, undertakings necessary to establish grave risk and facilitate safe return, so that the other CA can provide any requested info within the deadline.

**V. USEFUL RESOURCES to enhance knowledge and understanding on interpreting and applying 13(1)(b) –** Explanatory Report, Incadat, other Guides to Good Practise , International Hague Network of Judges to facilitate judicial communication, Judge's newsletter

Hopefully within the next few months to a year we will have very concise and practical guide for analyzing and applying the exception in 13(b), that will bring about more consistency and uniformity amongst the Contracting States.