



Pravni fakultet Osijek
Sveučilište J. J. Strossmayera u Osijeku



POAM PROJECT

TRAINING WORKSHOP BEST PRACTICE GUIDE

Protection of Abducting Mothers in Return Proceedings:
Intersection between Domestic Violence and Parental
Child Abduction

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POAM

- Collaborative research project: core consortium - UK, Germany, Italy and Croatia
- Rights, Equality and Citizenship Programme 2014-2020 (EU)
- Commenced on 1 January 2019
- Concerned with the interface between threatened or continuing domestic violence against mothers who have abducted their children across international borders
- Regulation 606/2013 on mutual recognition of protection measures in civil matters and the Directive 2011/99/EU on the European Protection Order



No longer applicable → 1996 Hague
Child Protection Convention

- [Best Practice Guide](#)



Overview

1. Session one

- a. Legal framework pertinent to parental child abduction
- b. Important background issues
- c. Protective measures in the context of return proceedings: preliminary considerations
- d. Approach to the assessment of the Grave Risk of Harm

2. Session two

- a. Protective measures available to victims of domestic violence under domestic law
- b. 1996 Hague Convention
 - Article 11 (Jurisdiction)
 - Article 23 (Recognition and Enforcement)
- c. Case Study
- d. UK Case Law

Session One:

Child abduction and domestic
violence: legal framework,
background and preliminary
considerations



1a. Legal framework pertinent to parental child abduction

❖ The 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the 1980 Hague Abduction Convention')

❖ The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

- **Aim:** to tackle the problem of international parental child abduction by securing the prompt return of an abducted child to the country of his/her habitual residence so that issues related to the custody of or access to the child be resolved in that jurisdiction.
- **Underlying premise:** wrongful removal or retention of a child across international borders is generally contrary to the child's welfare
- **Exceptions to the return policy:** justified only in exceptional circumstances (Arts 12(2), 13 and 20 of the 1980 Convention), including where '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.' ('the grave risk of harm defence' – Art 13(1)(b))
- **Brussels IIa Regulation:** reinforces the principle of the prompt return of the child



73% of abductions committed by mothers



Frequent incidence of domestic violence



Exceptions to return: Art 13(1)(b) – ‘grave risk of harm’



Gap: safety of the abducting mother upon the return

the “intersection”

1b. Important background issues

❖ Primary carer mother as abductors

- Vulnerabilities of returning mothers in abductions committed against the background of domestic violence: e.g.:
 - risk of re-victimisation upon return to the State of origin;
 - the lack of financial and emotional support in the State of origin;
 - possible financial dependence on the left-behind father on the return;
 - sometimes the lack of credibility as a respondent in return proceedings due to the failure to report the incidents of domestic violence in the State of origin prior to the abduction;
 - and the exposure to 'intimidatory litigation' whereby the left-behind father abusively uses the return proceedings as a means of further harassment rather than from a genuine desire to secure the return of the child.

1b. Important background issues

❖ Safety of the abducting mother upon return

- Wording of Article 13(1)b) - the situation of the child which is the prime focus of the inquiry.
- No consideration of the safety of the abducting mother upon the return, either in the Convention or in the Brussels IIa Regulation
- Nevertheless, the Hague Conference has on several occasions recognised that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent

❖ Tension between the Convention summary return policy and considerations over the safety of the abducting mother

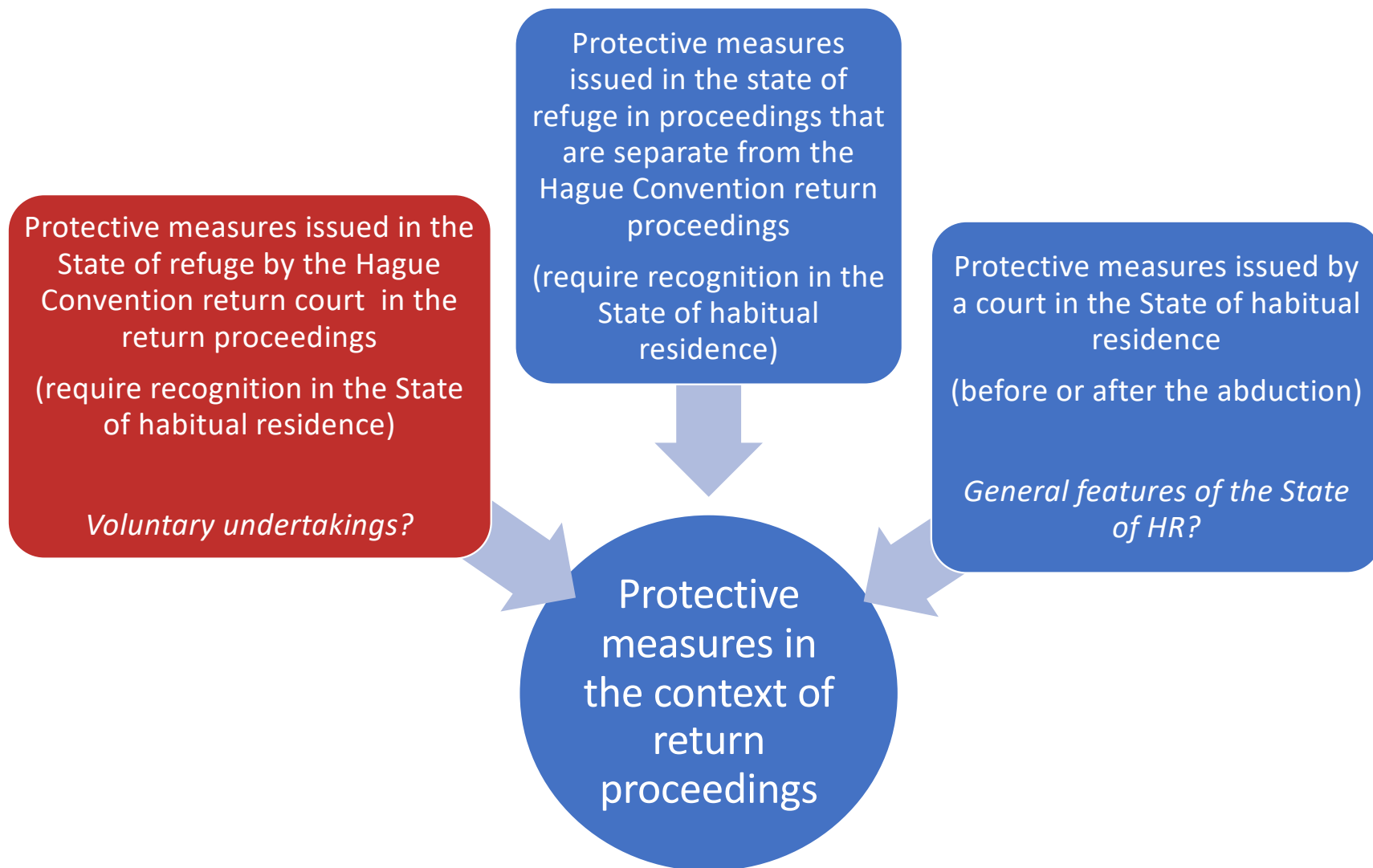
- The impact on timing in addressing key considerations of the adequacy and enforceability of protective orders

1b. Important background issues

❖ Grave risk of harm and domestic violence: harm to the abducting mother vs harm to the child

- Domestic violence can take many forms → not limited to physical violence but can extend to psychological or emotional abuse.
- Child as a witness to domestic violence: domestic violence directed towards a parent can be seriously harmful to the children who witness it or who depend upon the psychological health and strength of their primary carer for their health and well-being (impact on the parenting capacities of the abducting mother)
- The risk to the abducting mother is intertwined with the risk to the child → may justify findings of the child being at a risk of 'psychological harm or other intolerable situation' upon the return (Art 13(1)(b))

Protective measures in the context of return proceedings: preliminary considerations



1c. Protective measures issued in the State of refuge

PMs for the mother issued in the State of refuge by the Hague Convention return court in the return proceedings → PMs for the mother as indirect protective measures for the child



recognition in the State of HR:
Protection Measures Regulation /
1996 Hague Child Protection
Convention

PMs for the mother issued in the State of refuge proceedings that are separate from the Hague Convention return proceedings → PMs for the mother as self-standing measures



recognition in the State of HR:
Protection Measures Regulation / no
international instrument available
but note Hague Conference
legislative project on Recognition
and Enforcement of Foreign Civil
Protection Orders

1c. Protective measures issued in the State of refuge

❖ Recognition and Enforcement of Foreign Civil Protection Orders

- The Hague Conference Agenda since 2011
- The objective is to establish “appropriate civil protection order regimes for victims of domestic violence and / or other types of harmful interpersonal behaviour”
- To address the lack of a specific international multilateral mechanism to assure that any protection order for the benefit of a returning accompanying parent of a child who is subject to a Hague 1980 return order will be recognised and enforced in the country of return; noting that the 1996 Hague Convention “does not necessarily extend measures of protection to an accompanying parent”

1c. Protective measures issued in the State of refuge

❖ Voluntary undertakings

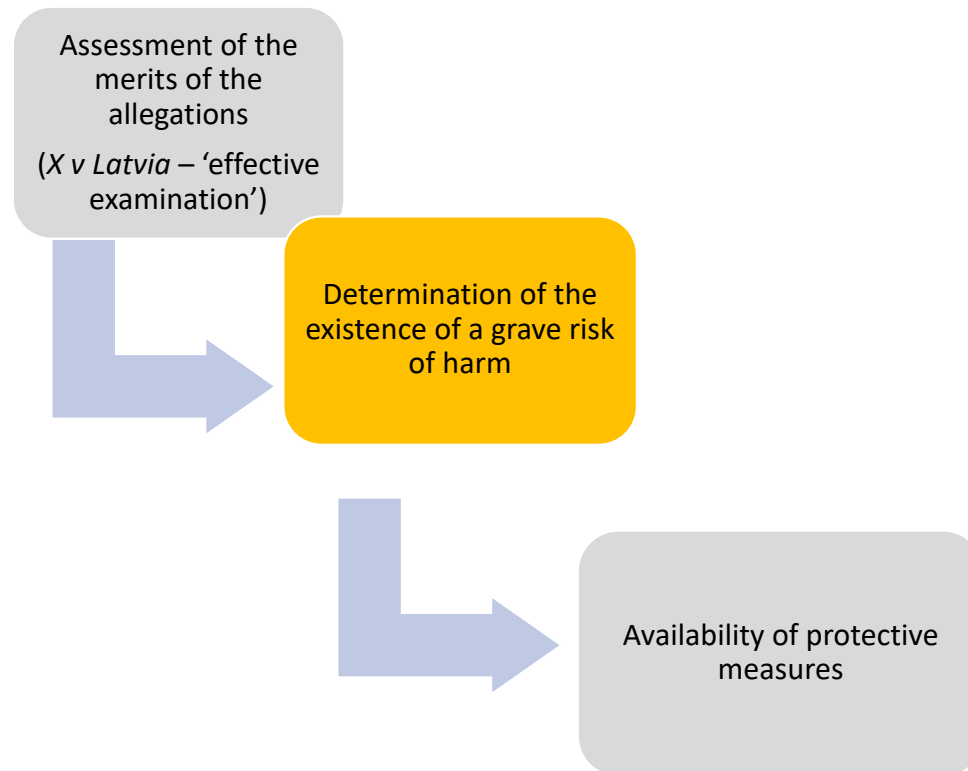
- Promises offered to the court to overcome obstacles which may stand in the way of returning a child
- Often utilised to address concerns relating to the safety of the mother
- Addressing short-term situation upon return and until the child's welfare comes before the requesting State
- Examples: non-molestation/non-harassment terms ('not to use violence or threats towards the mother, nor instruct anybody else to do so', 'not to communicate with the mother directly'); finance ('to pay for the return tickets for the mother and child', 'to provide financial support/maintenance') residence etc.
- Undertakings may not always concern protective measures as such but more 'light touch practical arrangements' ('soft-landing' measures)



Problem:

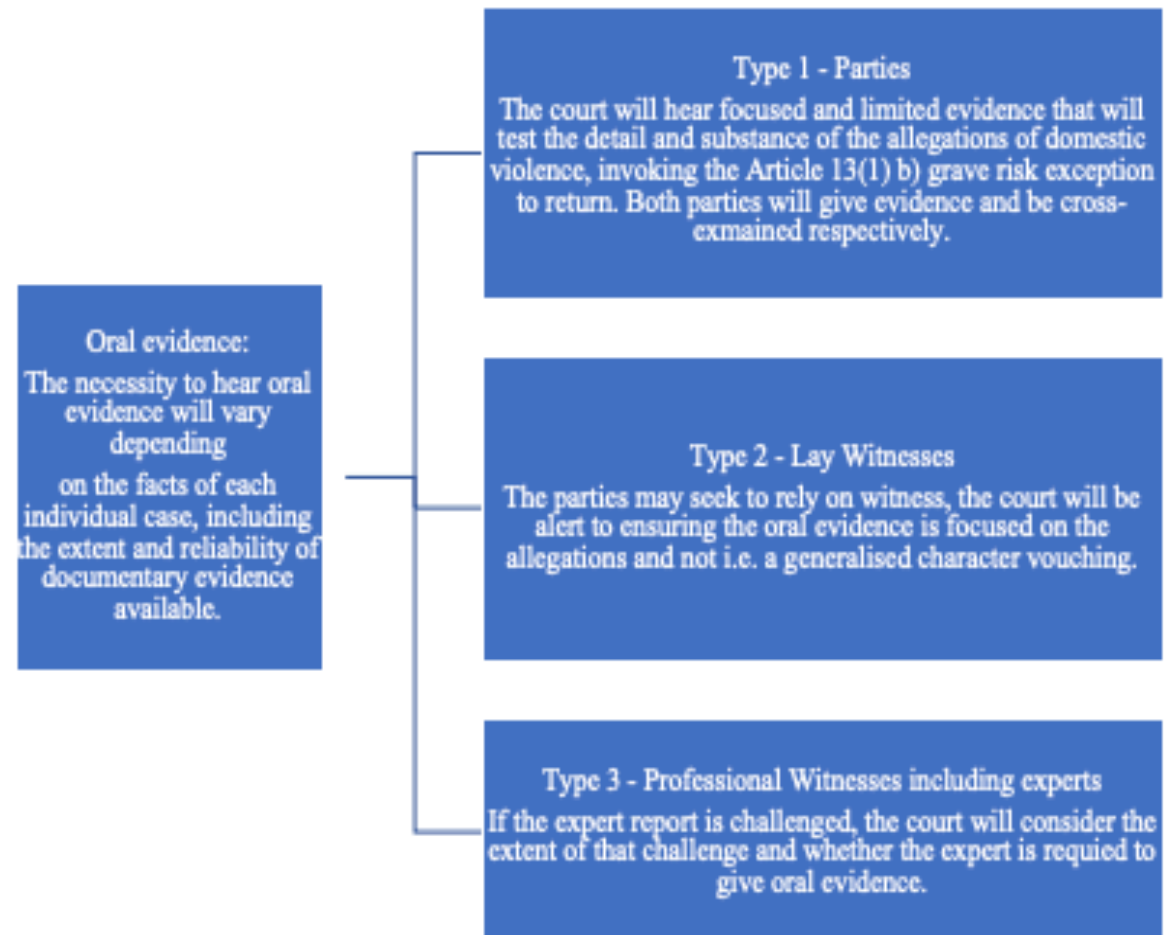
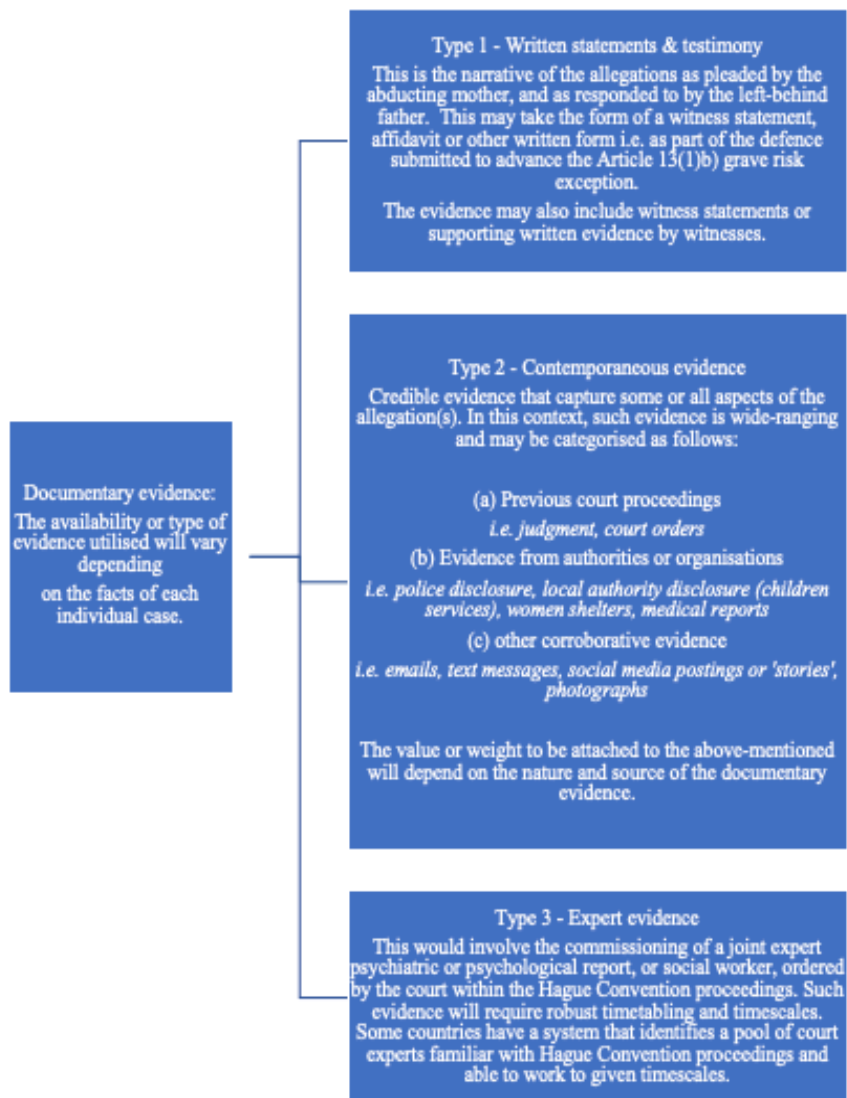
compliance/enforceability (to be addressed in Session 2)

1d. Approach to the assessment of the grave risk of harm -
“the evaluative assessment approach”

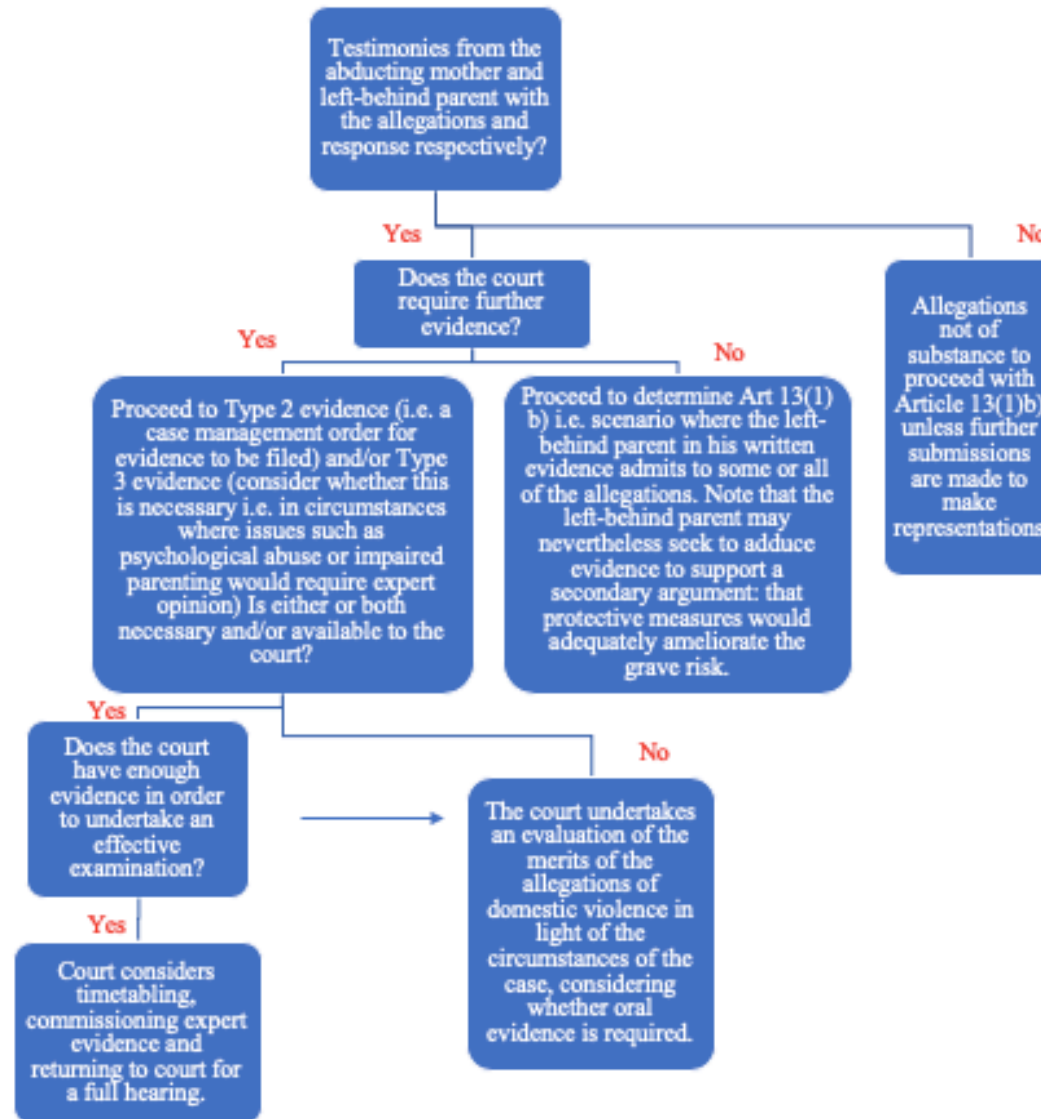


1d. Approach to the assessment of the grave risk of harm - *“the evaluative assessment approach”*

- ❖ Determining the need for protective measures (see diagrams)
 - Evidence: what is the minimum evidence to establish allegations of domestic violence in return proceedings – e.g. medical reports, police reports, fact-finding hearing
 - Burden and standard of proof
 - Factors to consider: e.g. type of harm to the abducting mother (physical, psychological or both); level of alleged violence (severe, moderate, mild); impact on the abducting mother’s mental health (subjective vs objective anxieties).



| Navigating the evidence types



Session Two:

Measures for the protection of abducting mothers



2a. Protective measures available to victims of domestic violence in the UK

❖ England and Wales

Criminal law

- Offences of domestic abuse may be prosecuted under a number of different offences i.e. assault occasioning actual bodily harm under Offences against the Persons Act 1861 as a result of physical harm inflicted on the victim.
- Harassment and stalking offences under the Protection of Harassment Act 1997
- Offence of 'controlling or coercive behaviour in an intimate or family relationship' brought into force in 2012

Civil Law

- Restraining Order
- Non-molestation Order
- Occupation Order
- Other developments : Domestic Violence Protection Notices (DVPN) and Domestic Violence Protection Orders (DVPO)

2a. Protective measures available to victims of domestic violence in the UK

❖ Scotland

Criminal law

- Offences of domestic abuse may be prosecuted under a range of offences i.e. assault, breach of the peace at common law, stalking.
- The Abusive Behaviour and Sexual Harm introduced a statutory aggravation domestic abuse.
- Statutory offences of domestic abuse can now be prosecuted under the Domestic Abuse (Scotland) Act 2018.

Civil Law

- Non-harassment Orders
- Domestic Abuse Interdicts
- Exclusion Orders
- Other developments : consultation on protective orders for people at risk of domestic abuse

2b. The 1996 Hague Convention

The “UK Pathway”

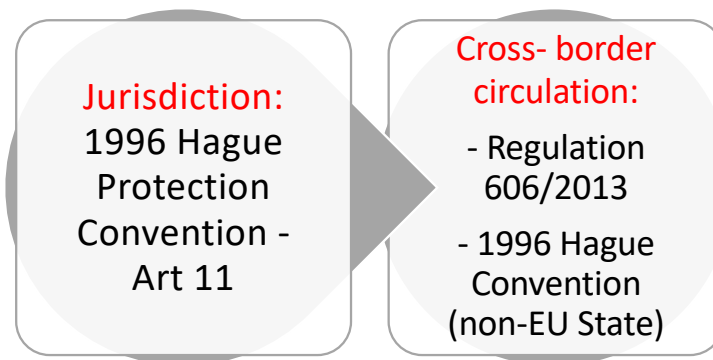


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From the POAM Best Practice Guide

Pathway 3: Jurisdiction based on Art 11 of the 1996 Hague Protection Convention

- PMs issued in the Hague return proceedings
- Underlying rationale: PMs for the mother = indirect PMs for the child
- Jurisdiction: Art 11 of the 1996 Hague Convention → presence of the child on the territory of the State of refuge
- Practical Handbook on the Operation of the 1996 Hague Child Protection Convention, para. 6.4
- Advantages of the recognition procedure under Regulation 606/2013 over the recognition procedure under the 1996 Hague Convention (declaration of enforceability)
- Non-EU State → the 1996 Hague Convention only



2b. The 1996 Hague Convention

❖ Jurisdiction

- Article 11 of the 1996 Hague Convention provides for the jurisdiction to issue measures based on the presence of the child on the territory of the State of refuge. Art 11(1) provides:

“In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.”

2b. The 1996 Hague Convention

❖ Recognition and Enforcement

- Article 23 of the 1996 Hague Convention provides for the recognition and enforcement of measures:

“The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.”

2c. Case Study

- This case concerns 'V' a little girl aged 5. Her parents, Mr and Mrs N, are both Portuguese citizens. Mrs N a British born citizen acquired Portuguese citizenship as a spouse by naturalisation in 2018. Mr N was born and has always lived in Portugal.
- The parties met in England in 2011, married in September 2014 and in March 2015, the mother relocated to Lisbon, Portugal. V was born in Lisbon shortly thereafter and was habitually resident in Portugal.
- On 12 March 2020, the mother travelled to England for a two-week holiday with V but did not return on the expected flight back. On 23 March 2020, the mother and V became stranded in the UK when lockdown measures were implemented, and a travel ban was introduced in the face of the Covid-19 pandemic.

- At the end of April 2020, the mother informed the father that she would not be returning to Portugal. The mother asserted that the travel to England was also to trial a separation following incidents of aggressive and abusive behaviour by the father towards her. . The incidents intensified after the birth of V after the mother suffered from a short period of post-natal depression when the father would often criticise her care of V. The mother's case was that arguments would escalate to verbal and physical abuse, including slapping, pushing, twisting of her arm and threats to remove V from her care, and control so that she rarely visited her family in England. The mother alleged that on two occasions when the father had been drinking excessively, V was present during the arguments, including when he twisted her arm and when he pushed her, causing V to cry and to become clingy with the mother in the days that followed.
- The mother asserted that prior to leaving Portugal she sought support from a women's charity that advised her to leave the home and move to a shelter, and also to obtain measures of protection. She was intending to follow through with that advice until the father gave her permission to travel to the UK to visit her family.

- On 12 October 2020, the father commenced summary return proceedings under the 1980 Hague Convention and the Brussels IIa Regulation. The father denied the allegations of domestic violence, though accepted that there were occasions when the couple would argue and that this would get out of hand, but it was nothing more than raised voices and unkind words. The father's position was that the visit to the UK was for a short holiday and the mother and V were due to return 2 weeks later, and that he had booked their return flights for 26 March 2020 when the lockdown happened. It was agreed that once travel restrictions were eased the mother would return with V. Whilst he agreed to a trial separation, he did not consent to the mother relocating with V to England during that separation period.
- The mother intends to defend the application relying on Article 13(1) b) based on the domestic violence that she has suffered, and that V has been exposed to. The mother asserts that there is a grave risk of physical and psychological harm or other intolerable situation for V should a return order be made. The mother further asserts that she could not return due to her fear of the father and, therefore, separating V from her primary carer by making a return order would also constitute a grave risk of harm.

2d. UK Case Law

❖ *Re Y (A Child) (Abduction: Undertakings Given for Return of Child)* [2013]

EWCA Civ 129: *“Protective measures may include undertakings, and undertakings accepted by this court or orders made by this court pursuant to Article 11 of the 1996 Hague Child Protection Convention are automatically recognised by operation of Article 23 in another Convention state”*

↓ reiterated in

❖ *Re A (A Child) (Hague Abduction: Art 13(b) Protective Measures)* [2019]

EWHC 649 (Fam), para 25

❖ *RD v DB* [2015] EWHC 1817 (Fam): *“[i]f orders are made under Article 11 [of the 1996 Convention] then by virtue of Article 23 they shall be recognised by operation of law in all other contracting states”*.

❖ The Practice Guidance on Case Management and Mediation and International Child Abduction Proceedings, 13th March 2018, paras. 2.9(b), 2.11(e) and 3.6: *“protective measures (including orders that may be subject to a declaration of enforceability or registration under Art 11 of the 1996 Convention or, where appropriate, undertakings) the applicant is prepared ... to offer”*.



Any questions?

Thank you!

<https://research.abdn.ac.uk/poam/>

Evaluation forms please!

Resources: Best Practice Guide, Training Materials, POAM
National Reports (UK, Croatia, Germany, Italy, Serbia,
Spain, Slovenia); experts workshop information document,
POAM video.

