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Across the Border and Back Again: Immigration Status and the Article 12 “Well-Settled” Defense

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**ACROSS THE BORDER AND BACK AGAIN:
IMMIGRATION STATUS AND THE ARTICLE 12
“WELL-SETTLED” DEFENSE**

*Michael Singer**

The Hague Convention on the Civil Aspects of International Child Abduction is a multilateral international treaty designed to effectively govern the return of children abducted (often by a parent) and taken to a foreign country. In most cases, if the “left-behind” parent applies for relief under the Convention within a year of the abduction, the child must be returned to the country of origin for a custody hearing. If, however, the application for return is made more than one year after abduction and the child is now “well-settled” in their new environment, the application may be denied under the well-settled affirmative defense provided by Article 12 of the Convention. The Convention does not, however, specify which factors are to be considered in a well-settled determination, and courts have frequently grappled with how immigration status (particularly, whether the abducting parent and child are living in the new country illegally) should impact the determination. U.S. and international courts have adopted one of three approaches to the issue: granting immigration status considerable weight in the determination, treating immigration status as one of a number of equally weighted factors in the determination, or granting immigration status considerably little weight in the determination. This Note addresses this conflict and concludes that courts should generally accord immigration status little weight, except where uncertain immigration status is likely to affect the child’s future prospects, irrespective of a deportation risk.

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INTRODUCTION

In 2004, Diana Lucia Montoya Alvarez and Manuel Jose Lozano, both British citizens originally from Colombia, met in London and began dating.¹ Though they never married, Diana eventually gave birth to a baby girl on October 21, 2005.² Shortly thereafter, things took a turn for the worse. Diana claimed that Manuel had frequently abused her, calling her names and attempting to rape her.³ Their child, exposed to these domestic disputes, developed a host of problems, including frequent and spontaneous fits of crying, nightmares, and bed-wetting.⁴ Nonetheless, Manuel submitted that the three maintained a relatively normal family life.⁵

On November 19, 2008, Diana and her daughter set out for nursery school but never returned.⁶ Instead, they hid out at a women's shelter for nearly seven months before arranging for a clandestine trip across the Atlantic Ocean.⁷ In New York City, the two rendezvoused with Diana's sister, a U.S. citizen with a family of her own.⁸ Finally, Diana and her daughter were safe from her husband.

Manuel, however, had other ideas. Still believing his family could reconcile their differences, he pursued every available means to locate his

1. *Lozano v. Alvarez*, 697 F.3d 41, 45 (2d Cir. 2012).

2. *Id.* at 45–46.

3. *Id.* at 45.

4. *Id.* at 46.

5. *Id.* at 45.

6. *Id.* at 46.

7. *Id.*

8. *Id.*

daughter in the United Kingdom before learning that she was now living in New York.⁹ Desperate to reunite with her, he filed a petition for the child's return under the Hague Convention on the Civil Aspects of International Child Abduction (the Convention).¹⁰ Manuel claims that the child should be returned to the United Kingdom.¹¹ Diana claims the child now has an established life in New York.¹² The battle lines are drawn, but which party should prevail? Should the fact that Diana and her daughter are living in New York illegally impact the court's decision? This Note will attempt to answer this difficult question.

As the Ninth Circuit has stated, "It is never an easy nor a joyous task to resolve a dispute between parents that may determine the custody of their child; nor is the outcome ever fully satisfactory. Frequently, both sides offer appealing, indeed compelling, arguments. Yet, both cannot prevail."¹³ Custody battles are inherently emotionally charged disputes, and they are made all the more complex when they cross international lines. Indeed, situations such as the one described above are not uncommon and have far-reaching, significant effects. The court's determination of whether the child may retain residence in a new country is far more complex than a common domestic custody dispute. The situation becomes even more muddled when, as is frequently the case, the fleeing parent and child are in the new country illegally.

Fortunately, over eighty nations (including the United States) have implemented a treaty intended to provide a framework for remedying these difficult scenarios.¹⁴ The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty with the goal of "protect[ing] children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return."¹⁵ Convened in 1980 at The Hague, the Convention deals exclusively with unilateral, wrongful removal of children by parents, guardians, or close family members.¹⁶ The issue of international child abduction is significant. In the one-year period between October 1, 2006,

9. *Id.* at 47.

10. *See id.*

11. *See id.* at 47–48.

12. *See In re Lozano*, 809 F. Supp. 2d 197, 220 (S.D.N.Y. 2011).

13. *In re B. Del C.S.B.*, 559 F.3d 999, 1001 (9th Cir. 2009).

14. *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Status Table*, HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=24 (last visited Apr. 19, 2013) [hereinafter *Status Table*]. These eighty nations include both Convention members and nonmembers. *Id.*

15. *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Child Abduction Section*, HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/index_en.php?act=text.display&tid=21 (last visited Apr. 19, 2013).

16. PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 1, 4 (1999).

and September 30, 2007, 355 applications for the return of 518 children were submitted to the U.S. Central Authority alone.¹⁷

Though the Convention aims to provide for the swift return of abducted children, it does grant a number of affirmative defenses that may be asserted by the abducting parent to counter the return application. One such affirmative defense is Article 12, the “well-settled” defense.¹⁸ Article 12 states that a child shall be returned to the petitioning parent if the petition is filed within a year of the child’s abduction.¹⁹ If, however, the abducting parent can establish that the petitioning parent has applied for relief under the Convention *more* than a year after abduction *and* the child is now well-settled in their new environment, the child may be allowed to remain in the new country.²⁰ The Convention does not, however, specify how this well-settled determination is to be made or what factors may be considered.²¹ Additionally, the Convention offers no guidance on how immigration status should be treated in the well-settled determination.²²

Both U.S. and international courts have adopted a variety of approaches in determining the proper weight to be accorded to immigration status in the well-settled determination. Some courts have granted immigration status considerable weight in finding the child not to be well-settled, holding that uncertain immigration status significantly undermines an otherwise well-settled finding.²³ Other courts have considered it as one of a number of equally weighted factors.²⁴ Further, some courts have accorded immigration status significantly less weight, finding the child to be settled despite an uncertain immigration status.²⁵ This conflict also implicates a broader issue: Should courts take the child’s future prospects into account in making the well-settled determination?²⁶ This Note will examine these two issues.

17. U.S. DEP’T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 5 (April 2008), available at <http://travel.state.gov/pdf/2008HagueAbductionConventionComplianceReport.pdf>. Each signatory is required to designate a Central Authority “to discharge the duties which are imposed by the Convention.” Hague Convention on the Civil Aspects of International Child Abduction art. 6, Oct. 25, 1980, T.I.A.S. No. 11,670 [hereinafter Hague Convention].

18. Hague Convention, *supra* note 17, art. 12.

19. *Id.* (“Where . . . a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.”).

20. *Id.* (“The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year . . . shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.”).

21. *See, e.g., In re B. Del C.S.B.*, 559 F.3d 999, 1003 (9th Cir. 2009).

22. *See, e.g., id.* at 1001–02.

23. *See, e.g., In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001).

24. *See, e.g., Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1281–82 (N.D. Ga. 2004).

25. *See, e.g., Lozano v. Alvarez*, 697 F.3d 41, 45 (2d Cir. 2012).

26. For example, some courts have rejected a “well-settled” finding on the basis that immigration status significantly limits a child’s future prospects. *See, e.g., A. v. M.* (2002), 209 N.S.R. 2d 248, paras. 85–87 (Can. N.S. C.A.). Other courts have held that the determination should only consider the child’s current situation and should not entail speculation about the child’s future. *See, e.g., Dir.-Gen., Dep’t of Cmty. Servs. v M* (1998)

Part I of this Note provides the context for this discussion. Specifically, it considers the background of the Convention, U.S. implementation of the Convention, the procedure for the child's return, and jurisdictional issues. Part I also discusses a typical Convention case, the specifics of Article 12, considerations regarding the timing of the well-settled determination, the standard of review and treaty interpretation process, and relevant U.S. immigration classifications. Part II discusses the various approaches courts have taken in considering immigration status as a factor in the well-settled determination. Part II specifically considers three different ways courts have considered the issue: as a significant factor, as an equally weighted factor, and as a relatively insignificant factor. Part II also discusses how this conflict interacts with the broader question of whether (and to what degree) the determination should take a child's future prospects into account. Part III proposes that the U.S. Supreme Court consider the issue and promulgate a bright-line rule that immigration status should, by default, be accorded relatively minimal weight in the determination. It also argues, however, that courts should consider a child's likely future prospects in both their country of origin and country of current residence on a case-by-case basis.

I. THE CONVENTION, ARTICLE 12, AND IMMIGRATION ISSUES

Part I.A provides background information on the Convention, while Part I.B addresses U.S. implementation of the Convention. Part I.C highlights the standard procedure for the return of an abducted child, Part I.D discusses a host of jurisdictional issues associated with the Convention process, and Part I.E provides an example of a typical Convention case. Part I.F surveys Article 12 in detail, while Part I.G considers various issues surrounding the timing of the well-settled determination. Part I.H addresses the standard of review embraced in Convention cases and how the treaty interpretation process is generally conducted. Lastly, Part I.I notes various U.S. immigration classifications relevant to Article 12 cases.

A. *Hague Convention Background*

The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty signed at The Hague on October 25, 1980.²⁷ The Convention was specifically crafted to respond to the growing problem of international child abductions—spurred by increased global mobility, sociolegal and technical developments, and breakdowns in the

²⁴ Fam LR 178 ¶ 91 (Austl.). Still, other courts have found that immigration status will have a minimal impact on a child's future prospects in finding the child to be well-settled. *See, e.g., B. Del C.S.B.*, 559 F.3d at 1013.

²⁷ BEAUMONT & MCELEAVY, *supra* note 16, at 23.

traditional family structure.²⁸ Prior to its signing, the recovery of an abducted child was exceedingly difficult.²⁹

Hague Conventions each follow a relatively similar pattern. Once a topic is chosen, the first step is to investigate the issue and determine if there exists a collective will to address it.³⁰ The topic is then formally adopted by the Conference in Plenary Session, and the Permanent Bureau conducts further research.³¹ Once these steps are complete, the negotiation and drafting process can begin.³²

The origins of the Convention at issue in this Note can be traced to a meeting of the Special Commission of Miscellaneous Matters in January 1976.³³ At that meeting, a Canadian delegate suggested that the topic of “legal kidnapping” be added to the agenda.³⁴ In the years that followed, the Permanent Bureau began to research the subject, an inquiry that considered both the legal and sociological aspects of the issue.³⁵ Initially, the findings of the report generated little support for an international tribunal on the issue; there was, however, a call for increased international cooperation.³⁶ A Special Commission was convened to iron out the details of the first Convention draft, and eventually the draft was presented to Convention members for comments.³⁷ In the days that followed, the affirmative defenses against automatic return of the child—one of which was Article 12—generated the most intense debate.³⁸ Eventually, however, a compromise was reached, and the first four signatories—Canada, France, Greece, and Switzerland—signed the Convention on October 25, 1980.³⁹

The Convention has since been implemented by over eighty signatories, including the United States.⁴⁰ Though the drafters of the Convention originally intended to provide protection for mothers from abusive, child-abducting fathers, the vast majority of Convention cases to date have actually involved mothers who have abducted their children.⁴¹

28. *Id.* at 2.

29. *See id.* at 3. Prior to the Convention, the process for locating and returning the child was exceedingly complicated and inefficient. First, the child needed to be located. The court then would often engage in a lengthy proceeding—usually treating the abduction as a “legal kidnapping”—before ultimately determining whether return was warranted. *See id.*

30. *See id.* at 16.

31. *See id.*

32. *Id.*

33. *See id.* at 16–17.

34. *Id.* at 17.

35. *Id.*

36. *Id.* at 18.

37. *Id.* at 18–19.

38. *Id.* at 19.

39. *Id.* at 23.

40. *Status Table, supra* note 14. The United States has implemented the Convention through the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (2006).

41. *See* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 609–10 (2000). Indeed, a 2003 report found that 68 percent of abducting parents were mothers. *See* Nigel Lowe, *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil*

The primary objective of the Convention is to “protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.”⁴² The Convention specifically aims to restore the preabduction status quo and to deter parents from crossing international borders in the hope of securing a more sympathetic custody-dispute forum.⁴³ Indeed, the Perez-Vera report, an explanatory report accompanying the Convention, explains that the Convention aims to achieve deterrence by reestablishing the status quo, and allowing the court of habitual residence to make a custody determination.⁴⁴ The Convention’s focus is ultimately whether the child “should be returned to a country for custody proceedings and not what the outcome of those proceedings should be.”⁴⁵

B. U.S. Implementation of the Convention

The United States implemented the Convention through the International Child Abduction Remedies Act (ICARA).⁴⁶ Ratified in 1988,⁴⁷ ICARA codifies the Convention’s various articles, “establish[ing] legal rights and procedures for the prompt return of children who have been wrongfully removed or retained.”⁴⁸ ICARA lays out the prima facie case for wrongful retention. In order to secure return of the child, the “left-behind” parent must establish by a preponderance of the evidence that (1) the habitual residence⁴⁹ of the child immediately before the date of the alleged wrongful retention was indeed in a foreign country; (2) the retention is in breach of custody rights under the original country’s law; and (3) the petitioner was exercising custody rights at the time of the alleged wrongful retention.⁵⁰ If the petitioner can satisfy this burden, and has made his application within one year from the child’s abduction, the child must be returned unless an affirmative defense can be established.⁵¹

Aspects of International Child Abduction, HCCH, 21–22 (Sept. 2008), http://www.hcch.net/upload/wop/abd_pd03e1_2007.pdf.

42. Hague Convention, *supra* note 17, pmbl.

43. *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1310 (S.D. Fla. 2004) (citing *Lops v. Lops*, 140 F.3d 927, 936 (11th Cir. 1998)).

44. See Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, HCCH, 429 (1982), <http://www.hcch.net/upload/expl28.pdf>.

45. *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004) (emphasis omitted).

46. 42 U.S.C. §§ 11601–11611 (2006).

47. *Id.*

48. *Id.* § 11601(a); see also *Edoho v. Edoho*, No. H-10-1881, 2010 WL 3257480, at *4 (S.D. Tex. Aug. 17, 2010).

49. “Habitual residence” has been defined as the “place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child’s perspective.” *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1310–11 (S.D. Fla. 2004) (citing *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995)).

50. See *id.* at 1310.

51. See *id.* at 1312.

C. Procedure for the Return of the Child

The Convention process for securing the return of a child can be a lengthy and intimidating endeavor, especially for a petitioner with a limited grasp of English.⁵² Once an application has been completed, it is typically submitted to the Central Authority of the country of the child's habitual residence.⁵³ The application is then transmitted to the Central Authority of the country where the applicant believes the child now lives.⁵⁴ In the United States, the application is then passed on to the National Center for Missing and Exploited Children (NCMEC), which investigates the child's whereabouts and transmits the application to the relevant state attorney general.⁵⁵ The petitioner may then file his petition in either state court or the federal district court in the state where the child is currently living.⁵⁶

D. Jurisdictional Issues

Under ICARA, both U.S. district and state courts are granted concurrent original jurisdiction over petitions filed under the Convention.⁵⁷ As a result, judges with a wide range of experience and expertise hear Convention cases.⁵⁸ State and federal courts are theoretically supposed to apply and interpret the Convention in the same way. Federal courts, however, are generally more likely to interpret the Convention appropriately but are often considered slower avenues of resolution.⁵⁹ In contrast, state courts may be more efficient in resolving family law and custody issues but often misconstrue the Convention's mandate by considering the underlying merits of the custody action, rather than returning the child to the country of habitual residence (in the event that the well-settled defense proves unsuccessful) for a custody determination.⁶⁰

52. See, e.g., *In re B. Del C.S.B.*, 559 F.3d 999, 1006 (9th Cir. 2009). For example, in *B. Del C.S.B.*, the father petitioning for the return of his daughter to Mexico made numerous trips to the Mexican Minors Protection Department, met with the Mexican State Department, and eventually submitted an application under the Convention. *Id.* He was forced to wait nearly seven months, however, while the application was translated into English. *Id.*

53. See, e.g., *id.*

54. See, e.g., *id.*

55. See, e.g., *id.*

56. See ICARA, 42 U.S.C. § 11603(a) (2006) ("The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention."); see also *B. Del C.S.B.*, 559 F.3d at 1006–07.

57. *In re Koc*, 181 F. Supp. 2d 136, 146 (E.D.N.Y. 2001).

58. Catherine Norris, Comment, *Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98 CALIF. L. REV. 159, 167 n.58 (2010).

59. See *id.*

60. See *id.*

E. A Typical Hague Convention Case

Some scholars have noted that “[a]bductions occur for a variety of reasons from the narcissistic to the heroic.”⁶¹ Though they necessarily vary, the vast majority of Convention cases involve mothers and children fleeing due to domestic violence and the inability of their home country to protect them.⁶² Other common reasons for abductions include the desire to exact some sort of revenge on the left-behind parent, the desire to protect the child from harm, and the desire of one parent to return to their country of origin.⁶³

The most common destination is the United States.⁶⁴ Indeed, the United States receives more petitions for the return of children than any other signatory to the Convention.⁶⁵ Since the late 1970s, the State Department estimates that the United States has received inquiries for over 16,000 cases of international child abduction.⁶⁶

F. Article 12: The Well-Settled Defense

The Convention provides a number of affirmative defenses that may be asserted by the abducting parent to prevent the return of the child to the country of origin.⁶⁷ One such defense is established in Article 12—the well-settled defense.⁶⁸ Article 12 specifically states that “[t]he judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year . . . shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.”⁶⁹ The defense is based on the rationale that when a child has become settled and adjusted to a new environment, a

61. Geoffrey L. Greif & Rebecca L. Hegar, *International Parental Abduction and Its Implications for Social Work Practice: Great Britain to the United States*, 7 CHILD. & SOC'Y 269, 270 (1993).

62. Norris, *supra* note 58, at 160.

63. See Greif & Hegar, *supra* note 61, at 270.

64. Lowe, *supra* note 41, at 33.

65. See *id.*

66. See Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 VIOLENCE AGAINST WOMEN 115, 118 (2005).

67. See *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1310 (S.D. Fla. 2004). Courts have been directed to construe these defenses narrowly. *Id.*

68. Other affirmative defenses that may be raised include (1) the parent seeking return of the child consented to the child's removal or retention, (2) the return of the child is not permitted under fundamental principles of human rights, and (3) returning the child would place the child at “grave risk” of harm. See *id.* Despite the existence of these affirmative defenses, however, courts retain ultimate discretion in determining whether a child should be returned to their country of habitual residence. See Hague Convention, *supra* note 17, art. 18. Article 18 of the Convention states that the defenses “do not limit the power of a judicial or administrative authority to order the return of the child at any time.” *Id.* Thus, courts retain ultimate discretion in ordering the return of a child, despite the existence of an affirmative defense, if return would further the aims of the Convention. See *Ahumada Cabrera*, 323 F. Supp. 2d at 1310.

69. Hague Convention, *supra* note 17, art. 12.

forced return might only serve to cause the child further distress, accentuating the harm caused by the initial relocation.⁷⁰

The Convention declined, however, to provide any specification as to what constitutes well-settled, and courts have, in response, taken a variety of approaches in interpreting the defense. It is largely agreed that the definition should reflect the Convention's intention of providing a swift return of the child if possible, and to have custody matters decided in the sovereign with the strongest interest in the child's care and protection.⁷¹ At least one court has viewed the definition as a two-pronged analysis involving (1) the physical element of being established in a new community and (2) an emotional and psychological element projecting stability into the future.⁷² The U.S. State Department has declared that a "settled" finding is appropriate where "nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof."⁷³ Courts have agreed, however, that this burden must be established by a preponderance of the evidence.⁷⁴

The list of factors frequently considered is a long one, and each case dictates that different issues be addressed in the well-settled analysis. Generally, however, courts commonly consider the age of the child, the stability of the new residence, whether the child attends school or day care consistently, whether the child attends a religious institution regularly, the stability of the abducting parent's employment, and whether the child has friends and relatives in the area.⁷⁵ Courts will also less frequently consider the child's living environment, the involvement of the child's parents, any active measures taken to conceal the child's whereabouts,⁷⁶ and the possibility of prosecution for concealing the child.⁷⁷ Questions of immigration status do not often arise in a court's adjudication of the case-in-chief, often because most judges find it irrelevant to the question of whether a wrongful removal occurred.⁷⁸ Courts have found immigration

70. *In re B. Del C.S.B.*, 559 F.3d 999, 1002–03 (9th Cir. 2009).

71. See *In re Koc*, 181 F. Supp. 2d 136, 152 (E.D.N.Y. 2001); see also *In re Robinson*, 983 F. Supp. 1339, 1344–45 (D. Colo. 1997).

72. *C (a Child)*, [2006] EWHC (Fam) 1229, [46] (Eng.).

73. Text & Legal Analysis of Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986).

74. *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1310 (S.D. Fla. 2004).

75. *Id.* at 1314; *Anderson v. Acree*, 250 F. Supp. 2d 876, 881 (S.D. Ohio 2002); see also *Wojcik v. Wojcik*, 959 F. Supp. 413, 421 (E.D. Mich. 1997).

76. Concealment of the child is a frequent occurrence and has provided no shortage of trouble for courts interpreting Article 12. Specifically, this issue has given rise to another hotly contested and timely debate that is ultimately beyond the scope of this Note: May the one year period for return of the child be tolled where the child's whereabouts have been concealed by the abducting parent? Both domestic and international courts have interpreted the tolling issue differently, and it frequently accompanies the immigration status debate that this Note addresses. For a detailed discussion of the tolling issue, see Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 FORDHAM INT'L L.J. 409 (2010).

77. *Ahumada Cabrera*, 323 F. Supp. 2d at 1314.

78. Norris, *supra* note 58, at 169.

status relevant, however, in determining if the “grave-risk”⁷⁹ and well-settled defenses apply.⁸⁰ Thus, immigration status, when relevant, is considered in the well-settled determination as well.

*G. Timing of Article 12 Well-Settled Determinations and
Consideration of Future Prospects*

In considering how the well-settled determination should be made, courts have taken a variety of approaches concerning the timing of the determination and whether the determination should ultimately consider the child’s likely future prospects in the new country. How courts approach this issue significantly affects whether, and to what degree, the court considers immigration status to be a relevant factor. Some courts have held that “[t]he test, and the only test to be applied, is whether the children have settled in their new environment. That test is to be applied either at the time of the application being made or at the time of trial.”⁸¹ Advocates of such an approach point to the Convention’s focus on the present, and contend that the Convention does not have an interest in determining the best interests of the child in the long term.⁸² In such instances, the determination of future well-being is better suited for the court conducting the ultimate custody proceeding.⁸³

Many courts have adopted the opposite approach, holding instead that the well-settled determination should consider a child’s future prospects.⁸⁴ Courts in favor of such an approach often weigh whether there appears to be an immediate threat of deportation,⁸⁵ and whether, on a case-by-case basis, children will be able to take full advantage of opportunities available to them.⁸⁶ Indeed, this approach cuts both ways. In some instances, courts may find the lack of opportunities for undocumented immigrants to be a significant factor in the consideration of how immigration status affects the well-settled determination.⁸⁷ In others, courts have found that the

79. *See supra* note 68.

80. *Id.*

81. *Dir.-Gen., Dep’t of Cmty. Servs. v M*, (1998) 24 Fam LR 178 ¶ 91 (Austl.).

82. *In re B. Del C.S.B.*, 559 F.3d 999, 1013 (9th Cir. 2009) (“The Convention . . . is concerned with the *present*, and not with determining the best interests of the child in the long term.”); *see also* *Matovski v. Matovski*, No. 06 Civ. 4259 (PKC), 2007 WL 2600862, at *8 (S.D.N.Y. Aug. 31, 2007) (noting that Article 12 does not invite courts to decide “which country offers a more comfortable material existence”).

83. *See B. Del C.S.B.*, 559 F.3d at 1013.

84. *See, e.g.*, *(A Child)*, [2006] EWHC (Fam) 1229, 2 Fam. 797 [55]–[57] (Eng.) (stating that new residence must “be as permanent as anything in life could be said to be permanent”).

85. *See, e.g., id.*

86. *See, e.g.*, *Lozano v. Alvarez*, 697 F.3d 41, 57 (2d Cir. 2012).

87. *See, e.g.*, *A. v. M.* (2002), 209 N.S.R. 2d 248, paras. 85–87 (Can. N.S. C.A.) (finding that a mother’s uncertain immigration status and potential inability to work were relevant to the “well-settled” determination).

protections afforded to undocumented immigrants weigh in favor of a finding that the child is well-settled.⁸⁸

H. Standard of Review/Treaty Interpretation Process

The process by which courts engage in treaty interpretation is essential to the court's ultimate determination of whether, and to what degree, immigration status should be considered in an Article 12 analysis. Courts often begin the treaty interpretation process by considering the text of the treaty and the context in which it is used.⁸⁹ The clear meaning of the treaty language controls, unless that interpretation is inconsistent with the intentions of the drafters.⁹⁰ Courts may employ rules of statutory construction in interpreting ambiguous passages but may also consider the history of the treaty and the way various signatories have interpreted a particular provision.⁹¹

Likewise, the standard of review embraced by appellate courts engaging in an Article 12 analysis plays a key role in how courts consider the various inquiries associated with a well-settled analysis. Indeed, there is some confusion over the standard of review to be applied in interpreting Article 12. Generally, courts have held that the factual findings underlying an Article 12 determination are reviewed for clear error, but the ultimate legal conclusion of whether a child is settled or not is reviewed *de novo*.⁹² Factual findings that are reviewed for clear error include whether the factors often considered in the well-settled determination are present in a particular case.⁹³ Whether these various factors are relevant to determining if the child is well-settled, however, is subject to *de novo* review.⁹⁴ For example, whether a child and mother are living in a country illegally is reviewed for clear error, but whether this factor is considered in finding the child to be well-settled or not is reviewed *de novo*.⁹⁵ This second issue—whether, and to what degree, immigration status should be considered in the determination—is the main focus of this Note.

I. Immigration Classifications

The distinction between immigration classifications is inherently relevant to the determination of whether a parent or child is living in the United States illegally. Three broad categories of immigration classifications exist. The first is permanent resident aliens, commonly referred to as

88. *See B. Del C.S.B.*, 559 F.3d at 1013. Such protections include the right to public education irrespective of immigration status, as well as a variety of public services available to undocumented immigrants including emergency Medicaid, school breakfast and lunch programs, and access to state nutritional programs. *Id.*

89. *See Lozano*, 697 F.3d at 50.

90. *Id.*

91. *Id.*

92. *See B. Del C.S.B.*, 559 F.3d at 1008; *see also Lozano*, 697 F.3d at 49–50.

93. *See B. Del C.S.B.*, 559 F.3d at 1008.

94. *See id.*

95. *See id.* at 1009–10; *see also Lozano*, 697 F.3d at 49–50.

immigrants.⁹⁶ These residents have been admitted to the United States as lawful permanent residents.⁹⁷ The second class, temporary residents (or nonimmigrants), consists of aliens admitted to the United States for a specific purpose, such as diplomats or students.⁹⁸ The last relevant class, commonly referred to as “EWIs” (entered without inspection) or undocumented workers, is made up of undocumented aliens living within the United States.⁹⁹ Most of the parties in Convention cases fall into this third category.¹⁰⁰

II. THE IMMIGRATION STATUS DEBATE: THREE APPROACHES

“To be sure, like all persons who have entered the United States unlawfully . . . children are subject to deportation. But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported”¹⁰¹

This uncertainty lies at the heart of the debate addressed by this Note. Indeed, the weight to be accorded to immigration status in the well-settled determination is significantly impacted by the likelihood that the child will be deported (among other factors).¹⁰² Although courts have consistently found immigration status to be a factor in the well-settled determination to date, no court has held it to be singularly dispositive.¹⁰³ Further, while district courts have often taken a child’s immigration status into account when deciding if the child is well-settled, until recently, only one federal appellate court—the Ninth Circuit—had directly addressed “whether a court may find that a child is not ‘settled’ for the purposes of Article 12 of the

96. See *Glossary of Terms*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=5bb767ee5cb38210VgnVCM100000082ca60aRCRD&vgnextchannel=5bb767ee5cb38210VgnVCM100000082ca60aRCRD> (last visited Apr. 19, 2013).

97. See *id.*

98. See *id.* Other common examples of temporary residents include foreign government officials, visitors for business or pleasure, aliens in transit through the U.S., international representatives, temporary workers and trainees, representatives of foreign media, exchange visitors, immediate relatives of U.S. citizens, intracompany transferees, NATO officials, and religious workers. *Id.*

99. See *Guevara v. Holder*, 649 F.3d 1086, 1088–89 (9th Cir. 2011) (defining an undocumented alien as one who “entered without inspection”).

100. See, e.g., *B. Del C.S.B.*, 559 F.3d at 1004; *In re Koc*, 181 F. Supp. 2d 136, 140 (E.D.N.Y. 2001).

101. *Plyler v. Doe*, 457 U.S. 202, 226 (1982) (citations omitted).

102. *Lozano v. Alvarez*, 697 F.3d 41, 57 (2d Cir. 2012). Other factors that are likely to impact the importance of the child’s immigration status are the likelihood that the child will be able to obtain legal status, the child’s age, and the extent to which the child may be harmed by an inability to receive certain benefits. *Id.*

103. See *id.* at 57.

Hague Convention for the reason that she does not have lawful immigration status.”¹⁰⁴

This part addresses the various approaches courts have taken in determining whether, and to what degree, immigration status should impact a finding that a child is well-settled. Specifically, Part II discusses the three prevailing ways district, appellate, and international courts have interpreted the immigration status issue as it relates to the well-settled determination: as a significant, as equally weighted, and as relatively insignificant.

A. *Immigration Status As a Heavily Weighted Factor*

The first cases addressed in this part have held immigration status to be a significant factor in the well-settled determination, often undermining a child’s otherwise settled status. *In re Ahumada Cabrera*,¹⁰⁵ decided by the Southern District of Florida, is one such case. The respondent, Lozano, fled with her child from her home in Argentina to Florida.¹⁰⁶ Upon her arrival, she told immigration officials that she and the child were simply visiting as tourists.¹⁰⁷ Not long after, however, the mother obtained illegal employment in the United States and registered her child in a Florida school.¹⁰⁸ The petitioner, the child’s father, eventually learned that Lozano and the child were living with Lozano’s sister in Florida, and initiated Convention proceedings.¹⁰⁹ In response, Lozano asserted that the child was now settled in Florida.¹¹⁰

The court found that despite the existence of numerous factors indicating that the mother and child had established significant ties to their new environment—including that the child attended school regularly, had good grades, and participated in extracurricular activities—the mother’s uncertain immigration status undermined a finding that the child was now “well-settled.”¹¹¹ The court granted significant weight to a comparative consideration of the child’s future prospects in both Florida and Argentina. The court noted that the mother lacked long-term job stability in Florida,

104. *B. Del C.S.B.*, 559 F.3d at 1001–02.

105. 323 F. Supp. 2d 1303 (S.D. Fla. 2004).

106. *Id.* at 1308. The Lozano in *Ahumada Cabrera* bears no apparent relation to the Lozano in *Lozano v. Alvarez*.

107. *Id.* at 1309.

108. *Id.* at 1308.

109. *Id.* at 1309.

110. *Id.* at 1312.

111. *Id.* at 1314 (holding that “any stability [the child] may enjoy in the United States is significantly undermined by the Respondent’s uncertain immigration status”). It is also worth noting (though it is ultimately beyond the scope of this Note), that the court additionally found that equitable tolling should apply in this scenario. *Id.* at 1313. The court held that, despite the fact that the father had filed his petition more than a year after the abduction, his petition was still timely (essentially rendering any application of the Article 12 defense moot). *Id.* The court thus found that the child’s return was warranted both under the standard provisions of the Convention mandating return if the petition is filed within one year of abduction, and because the well-settled defense was undermined by the mother’s immigration status. *Id.* at 1314–15.

and that the child faced no threat of deportation in her native country.¹¹² Therefore, the court held that “it is better for the child to return to Argentina now than for her to be deported at a later date when she has become firmly settled in the United States.”¹¹³

The Eastern District of New York came to a similar conclusion in *In re Koc*.¹¹⁴ In *Koc*, both the mother and father, though Polish, had resided in Greece with their young child.¹¹⁵ The mother obtained a six-month visa, and told the father she was taking the child to the United States to visit the child’s grandparents; however, she never returned.¹¹⁶ Both mother and child eventually established significant ties to their new country: the child obtained medical insurance in the United States and received regular medical and dental care, a number of the mother’s family members lived in the neighboring area, and the mother had steady employment as a piano teacher.¹¹⁷ An associate of the mother even testified that she would be willing to sponsor the mother for a visa if the mother and child were threatened with deportation.¹¹⁸

Despite the existence of these factors, however, the court found that the child was not settled in her new environment due to the uncertain immigration status of both the mother and child.¹¹⁹ The court noted that “[t]he fact that the Immigration Service may not be looking to deport [the mother and child] at this time does not, in any way, guarantee that that position will not change in the future”¹²⁰ Even though other members of the mother’s family were legal citizens, and a friend was willing to sponsor the mother, the court found that this did not significantly alter the uncertainty of the child’s future prospects.¹²¹

The Middle District of Florida has adopted a similar view. In *Lopez v. Alcalá*,¹²² the court found immigration status to be a significant factor undermining the well-settled determination.¹²³ *Lopez* involved a mother who fled with two of her children from Mexico to Texas, leaving the father and another child behind.¹²⁴ Though they entered the country illegally, the mother was able to secure employment at a dry cleaner and enroll her

112. *Id.* at 1314.

113. *Id.*

114. 181 F. Supp. 2d 136 (E.D.N.Y. 2001).

115. *Id.* at 140.

116. *Id.*

117. *Id.* at 143–44, 153–54.

118. *Id.* at 144.

119. *Id.* at 154. The court held that immigration status was one of a number of factors weighing against a finding that the child was settled. *Id.* Specifically, the court noted that the child had moved often since arriving in the United States and had developed few friends. *Id.* Further, the mother had been unable to establish lasting and significant employment. *Id.*

120. *Id.* The child’s father had actually been denied a visa to visit his wife and daughter in the United States because of their uncertain immigration status. *Id.*

121. *Id.* at 154 n.20.

122. 547 F. Supp. 2d 1255 (M.D. Fla. 2008).

123. *Id.* at 1260.

124. *Id.* at 1256–57.

children in public school.¹²⁵ Despite their EWI status, the mother and children applied for petitions seeking asylum in the United States.¹²⁶

In finding that the children were not well-settled in their new environment, the court considered a number of factors, including immigration status.¹²⁷ The court stated that a vast number of factors weighed in favor of finding that the children were settled: the children had adjusted well to school, made a number of friends, and learned English.¹²⁸ Yet, the court found that because the mother and children were illegal aliens, they were subject to deportation at any time, and therefore could never truly be settled in the United States.¹²⁹ Additionally, the court held that their applications for asylum status were irrelevant to the determination because they had not yet been approved and appeared to lack merit.¹³⁰

International courts have also addressed this inquiry, and have, in some instances, adopted a similar approach to that embraced by the U.S. district courts discussed above. *A. v. M.*,¹³¹ a case decided by the Nova Scotia Court of Appeals, concerned an American mother and child who fled to Canada.¹³² The mother and father were both American citizens and residents of Iowa.¹³³ They eventually divorced amid allegations of child abuse; however, these allegations ultimately proved to be unfounded, and the father was granted visitation rights with the child.¹³⁴ The mother, in an attempt to subvert the court's grant of visitation rights, fled with the child to Canada.¹³⁵ The mother remarried and subsequently separated from a Canadian man,¹³⁶ and eventually settled with the child in a small town in Nova Scotia.¹³⁷ Meanwhile, a U.S. judge ordered the return of both mother and child to Iowa.¹³⁸

In determining whether the child was well-settled in Nova Scotia, the court considered the significant connections established by the child in her community and the duration of her residence there.¹³⁹ The court noted, however, that the child still had significant ties to Iowa—specifically, the father's family lived in Iowa and the various professionals involved in the abuse allegations and custody proceedings were residents of Iowa.¹⁴⁰ The court ultimately held that ordering the child's return would further the

125. *Id.* at 1257.

126. *Id.*

127. *Id.* at 1260.

128. *Id.*

129. *Id.*

130. *Id.* at 1260 n.6.

131. (2002), 209 N.S.R. 2d 248 (Can. N.S. C.A.).

132. *Id.* para. 1.

133. *Id.* para. 3.

134. *Id.* paras. 3–7.

135. *Id.* paras. 9–10.

136. *Id.* paras. 11–13.

137. *Id.* para. 14.

138. *Id.* para. 19.

139. *See id.* para. 79.

140. *Id.* para. 79.

deterrent purpose of the Convention by preventing the mother from subverting an Iowa court ruling.¹⁴¹ The court placed significant weight on the child's future stability, specifically noting that since the mother and child were living in Canada illegally, their ability to remain there was, at best, uncertain.¹⁴² Further, the mother's uncertain immigration status was a significant barrier to her ability to secure long-term employment.¹⁴³ Therefore, the court held that the child was required to return to Iowa.¹⁴⁴

Canadian courts are not the only foreign jurisdiction to have considered the immigration status issue. In *Director-General, Department of Community Services v M.*,¹⁴⁵ the Family Court of Australia was presented with the opportunity to consider the role of immigration status in the well-settled determination. The parents were married in Poland and their children were Polish citizens.¹⁴⁶ Amid allegations that the father had abused the children, the mother sent both her son and daughter to live with her mother in Australia.¹⁴⁷ Eventually, the mother divorced the father, and, upon establishing a more stable living situation, sent for the children from Australia.¹⁴⁸ Her mother (the children's grandmother), however, refused to return the children.¹⁴⁹ Thereafter, the mother flew to Australia in an attempt to reestablish contact with the children.¹⁵⁰ At the time *Director General* was decided, the grandmother had an order for interim residence of the children, while the mother had an order for interim contact.¹⁵¹ Upon the completion of the instant proceedings, the court would consider the pending residence application.¹⁵²

At the time the case was decided, the children held bridging visas that allowed them to remain in the country temporarily, pending the outcome of a petition for permanent residence filed by the grandmother.¹⁵³ The court, in making its determination, recognized that in this case, the weight accorded to immigration status hinged on the outcome of the residence determination.¹⁵⁴ Specifically, the court noted that should it find the grandmother to have parental responsibility for the children, it would be extremely unlikely for Australian authorities to then refuse the children's

141. *Id.* para. 80.

142. *Id.* paras. 85–86.

143. *Id.* para. 87.

144. *Id.* para. 94.

145. (1998) 24 Fam LR 178 ¶ 91 (Austl.).

146. *Id.* para. 7.2.

147. *Id.* paras. 7.4–5. While the children were living in Australia, the grandmother's husband sexually abused one of the children. *Id.* para. 7.6. Interestingly, this abuse did not impact the grandmother's judgment that the children were better off in Australia and, startlingly, does not appear to be addressed in the well-settled determination engaged in by the court.

148. *Id.* paras. 7.7–8.

149. *Id.*

150. *Id.* para. 7.8.

151. *Id.*

152. *See id.*

153. *Id.* para. 74.

154. *Id.* para. 87.

application to remain in Australia.¹⁵⁵ The court reasoned, however, that if it found that the children were not well-settled, it was likely that the Australian authorities would deny a residency application and require the children to leave the country.¹⁵⁶

The court was disinclined, however, to consider the child's future prospects in its ultimate decision.¹⁵⁷ Noting that future considerations should have no bearing on the determination, the court concluded that there is "no reason to find that the children will be required to leave Australia."¹⁵⁸ Therefore, the court found that the children were likely settled at the relevant time.¹⁵⁹

A well-settled analysis, as seen in the other cases discussed in Part II.B, is usually singularly dispositive regarding the child's ultimate living situation. Thus, if a child is well-settled under Article 12, she is allowed to remain in the country. On the other hand, if the child is not well-settled under Article 12, absent another defense or the court's invocation of its Article 18 discretionary power, she is returned to her country of origin. In *Director General*, the court hinged the well-settled analysis on the outcome of a future residency determination. Therefore, though it appears the court intended to adopt a view that immigration status should play a limited role in the well-settled determination, it actually did just the opposite in granting immigration status particularly significant weight in the ultimate determination.¹⁶⁰

These cases have a number of factors in common. First, each of the district courts in the decisions discussed above considered immigration status as a relevant factor in the well-settled determination.¹⁶¹ Second, each of the courts (aside from *Director General* which, as discussed above, is a unique case) found that the children were not well-settled.¹⁶² Third, all the cases discussed above reflect a forward-thinking approach that considers the child's future prospects and how the threat of deportation or uncertain immigration status may impact the child's ability to flourish in a new environment.¹⁶³ The strongest common thread uniting these cases,

155. *Id.*

156. *See id.*

157. *Id.* paras. 91–92.

158. *Id.* para. 92.

159. *See id.* para. 93.

160. *See id.* para. 87.

161. *See Lopez v. Alcalá*, 547 F. Supp. 2d 1255, 1260 (M.D. Fla. 2008); *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004); *In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001).

162. *See Lopez*, 547 F. Supp. 2d at 1260; *Ahumada Cabrera*, 323 F. Supp. 2d at 1314–15; *Koc*, 181 F. Supp. 2d at 154–55.

163. *See Lopez*, 547 F. Supp. 2d at 1260 (“[T]heir residence in this country is not stable because neither [the mother] nor the children have legal alien status and, as such, are subject to deportation at anytime.”); *Ahumada Cabrera*, 323 F. Supp. 2d at 1314 (“[I]t is better for the child to return to Argentina now than for her to be deported at a later date when she has become firmly settled in the United States.”); *Koc*, 181 F. Supp. 2d at 154 (“The fact that the Immigration Service may not be looking to deport them at this time does not, in any way, guarantee that that position will not change in the future.”).

however, is the significant weight accorded to immigration status in the well-settled determination. Though each of the courts considered immigration status as one of a number of factors, they each ultimately concluded that uncertain immigration status significantly outweighed other mitigating factors.¹⁶⁴ Such an interpretation is one approach that has prevailed in the jurisprudence on this issue to date.

B. Immigration Status As an Equally Weighted Factor

The next group of cases treats immigration status as one of a number of equally weighted factors in the well-settled determination. In these cases, courts frequently find that though uncertain immigration status weighs against a well-settled finding, the totality of factors indicating that the child *is* well-settled may nonetheless allow for a well-settled finding. In other instances, the court simply considers immigration status as one factor among many weighing for or against a well-settled determination.

For example, in *Giampaolo v. Ermeta*,¹⁶⁵ a case from the Northern District of Georgia, a mother and child, both habitually resident in Argentina, fled to the United States.¹⁶⁶ Eventually, the petitioner learned of the mother and child's whereabouts and filed an application for return of the child with the Argentine Central Authority, but after the one-year period had lapsed.¹⁶⁷

Both the mother and child were in the United States illegally, although the mother stated, in asserting the Article 12 defense, that she had recently applied for citizenship.¹⁶⁸ The court held that it was entitled to "consider any relevant factor surrounding the child's living arrangement."¹⁶⁹ In doing so, the court considered the frequency with which the child and mother were forced to move within the United States, that the mother lacked any significant family support in the United States, and that the mother and child lacked citizenship status.¹⁷⁰ Additionally, the court considered that the child had attended at least three different schools, that the child had developed significant ties to Argentina, and that the mother and child were currently living with the mother's boyfriend—a convicted felon who had previously been charged with violating Georgia's Family Violence Act.¹⁷¹ These factors, when considered together, led to a finding that the child was not well-settled in the United States and so the court ordered that the child be returned to Argentina.¹⁷²

164. *Lopez*, 547 F. Supp. 2d at 1260; *Ahumada Cabrera*, 323 F. Supp. 2d at 1314; *Koc*, 181 F. Supp. 2d at 154.

165. 390 F. Supp. 2d 1269 (N.D. Ga. 2004).

166. *Id.* at 1274.

167. *Id.* at 1274–75.

168. *Id.* at 1282.

169. *Id.* at 1281 (citing *Ahumada Cabrera*, 323 F. Supp. 2d at 1313).

170. *Id.* at 1282.

171. *Id.*

172. *Id.* at 1282–83.

In *Edoho v. Edoho*,¹⁷³ decided by the Southern District of Texas, the court took the same approach—considering immigration status as one of a number of equally weighted factors—and found that the children *were* well-settled in their new environment.¹⁷⁴ In *Edoho*, the mother and father were married in Nigeria but eventually moved to the Bahamas, where the father had citizenship.¹⁷⁵ They had two children while living in the Bahamas, and the mother eventually fled with both children to her sister's house in Houston, Texas.¹⁷⁶ After some time, the father filed an application for assistance with the U.S. Department of State, requesting access to his children.¹⁷⁷ In coordination with the Bahamian Ministry of Foreign Affairs, this request eventually morphed into an application for return of the children under the Convention.¹⁷⁸ In the meantime, the mother had married a U.S. citizen and was in the process of applying for citizenship for both herself and her children.¹⁷⁹

The court, weighing a number of factors, found that the children were now well-settled in the United States.¹⁸⁰ Specifically, the court considered the stability of their living situation, their success in school, and their participation in various activities.¹⁸¹ Interestingly, despite noting the uncertain immigration status of the mother and children earlier in the opinion, the court did not specifically list immigration status as a factor considered in its determination.¹⁸² This is due, perhaps, to the high likelihood that both the mother and children would obtain citizenship because the mother had married a U.S. citizen.¹⁸³

173. No. H-10-1881, 2010 WL 3257480 (S.D. Tex. Aug. 17, 2010).

174. *See id.* at *7.

175. *Id.* at *1.

176. *Id.* The mother explained that she had fled the Bahamas because her husband had been abusive to her and the children. Interestingly, she also alleged that one of her reasons for fleeing was that, since her immigration status in the Bahamas was based on her nursing job and her marriage, her husband had threatened to have her deported. *Id.* at *3.

177. *Id.* at *2. In fact, the father waited nearly two years to file the application, despite having learned of the child's whereabouts within one year of the abduction. *Id.* at *3. The father explained that the delay was due to the great difficulty of finding a lawyer sufficiently versed in the Convention to accept his case. *Id.* The court found this argument unavailing. *See id.*

178. *See id.* at *2.

179. *See id.* at *4.

180. *Id.* at *7 (“And, the court finds that the children are ‘well-settled’ in their new home.”).

181. *Id.* at *6–7. The court also conducted a fairly intensive tolling analysis in finding that the father's delay in filing his petition could not be equitably tolled. *Id.* *7 Though the court did not explicitly state as much, it appears that the father's lack of concern in obtaining the immediate return of his children also factored into the court's well-settled determination. *See id.* (“[The mother] made no effort to conceal the children. While she did not inform [the father] of her whereabouts, she went to live openly with a known relative, she did not change her name or the children's names, and she enrolled [one of the children] in school. . . . The efforts [the father] did take to find them could not be described as determined or diligent. . . . Additionally, the record reflects that his other efforts were equally desultory.”).

182. *See id.* at *6–7.

183. *See id.* at *4.

In *Demaj v. Sakaj*,¹⁸⁴ decided by the District of Connecticut, a mother fled with her children from Italy to the United States.¹⁸⁵ Nearly a year and a half later, the left-behind father filed a petition for return of the children pursuant to the Convention and ICARA.¹⁸⁶ After filing the petition, the father visited the children in the United States and, after publicly threatening the mother, a warrant was issued for his arrest.¹⁸⁷ Shortly thereafter, the mother applied for a U-Visa, which provides temporary immigration status to aliens who are victims of qualifying criminal activity.¹⁸⁸ According to the mother, she and the children were able to obtain nonimmigrant status (specifically, legal permanent residence) in the United States, and the mother was further able to secure social security cards for herself and the children, employment authorization, and a Connecticut driver's license.¹⁸⁹

Previously, the mother and father (who was temporarily living in the United States during the course of the proceedings in this case) agreed that all of the immigration documents belonging to the mother and children would remain with the mother's counsel until the conclusion of the proceedings.¹⁹⁰ The mother had accessed her passport in applying for the U-Visa, and the father argued that this access was in violation of the parties' previous agreement.¹⁹¹ Further, he contended that the mother's subsequent change in immigration status was directly relevant to her ability to establish the well-settled defense.¹⁹²

The court in *Demaj* was asked to decide a motion to compel production of documents relevant to the ultimate well-settled determination, and did not, therefore, decide the merits of whether the underlying defense was warranted.¹⁹³ It did, however, engage in an in-depth discussion of whether immigration status is relevant to the well-settled determination.¹⁹⁴ The court conducted a broad survey of how U.S. courts have approached the relevance of immigration status in determining whether a child is well-settled.¹⁹⁵ After considering cases like *Ahumada*, *Koc*, and *Lozano v. Alvarez*¹⁹⁶ (the district court opinion), the court concluded that "[i]n the bulk of cases in which immigration status is considered [in a well-settled

184. No. 3:09 CV 255 (JGM), 2012 WL 476168 (D. Conn. Feb. 14, 2012).

185. *See id.* at *1.

186. *See id.*

187. *Id.*

188. *Id.* at *2.

189. *Id.*

190. *Id.* at *1.

191. *See id.* at *2.

192. *See id.*

193. *See id.* at *1.

194. *See id.* at *4–5.

195. *See id.* at *4 (listing cases).

196. *In re Lozano*, 809 F. Supp. 2d 197 (S.D.N.Y. 2011), *aff'd sub nom. Lozano v. Alvarez*, 697 F.3d 41, 45 (2d Cir. 2012), *petition for cert. filed*, No. 12-820 (U.S. Jan. 2, 2013); *see also* Part II.C.

analysis] . . . it is considered as only one element among many.”¹⁹⁷ The court also noted that in cases where immigration status was not considered, there was strong evidence of stability and numerous other factors weighing in favor of a well-settled finding.¹⁹⁸

The court granted particular deference to the district court’s decision in *Lozano*, which held that immigration status should only be a significant factor if there is an immediate and legitimate threat of deportation.¹⁹⁹ Thus, the court rejected the forward-looking approach embraced by other courts in holding that, insofar as Article 12 is implicated, the Convention is concerned with the present.²⁰⁰

Although they do not always come to the same conclusion, each of the courts in this section considers immigration status as one of a number of relatively equivalent factors in the well-settled determination.²⁰¹ Even where the court found a return warranted, immigration status was only one of many factors weighing against a well-settled finding.²⁰² This approach is closer to the approach that circuit courts, to date, have found to be the most appropriate: granting immigration status relatively little weight in the well-settled determination.

C. Immigration Status Granted Considerably Less Weight

The last group of cases addressed by this Note exhibits the growing tendency of courts to accord immigration status little, if any, weight in the well-settled analysis. In each of these cases, the court embraced a forward-looking approach in determining that the child was either unlikely to be deported, or that the child’s prospects were not significantly negatively impacted by an uncertain immigration status.²⁰³ To date, both the Second and Ninth Circuits have considered the issue, with each finding that immigration status should play a minimal role in the well-settled

197. *Demaj*, 2012 WL 476168, at *4.

198. *See id.* at *4 n.9. The court recently decided the merits of the case and reaffirmed its earlier conclusion that immigration status is to be considered as one element among many in the Article 12 determination. *Demaj v. Sakaj*, No. 3:09 CV 255 (JGM), 2013 WL 1131418, at *23–24 (D. Conn. Mar. 18, 2013).

199. *Demaj*, 2012 WL 476168, at *4 (citing *Lozano*, 809 F. Supp. 2d at 232–33).

200. *See id.* The subsequent *Demaj* decision deviated slightly from this approach in light of the Second Circuit’s decision in *Lozano*. Following the Second Circuit’s lead, the District of Connecticut considered how immigration status was likely to affect the benefits available to the children in the United States. *See Demaj*, 2013 WL 1131418, at *23.

201. *See Demaj*, 2012 WL 476168, at *4; *Edoho v. Edoho*, No. H-10-1881, 2010 WL 3257480, at *6 (S.D. Tex. Aug. 17, 2010) (listing immigration status as one of a number of relevant factors in a “well-settled” determination); *Giampaolo v. Ermeta*, 390 F. Supp. 2d 1269, 1281–82 (N.D. Ga. 2004) (same).

202. *See, e.g., Demaj*, 2012 WL 476168, at *4.

203. *See, e.g., Lozano v. Alvarez*, 697 F.3d 41, 45 (2d Cir. 2012) (“[W]hen making a now settled determination, courts need not give controlling weight to a child’s immigration status.”); *In re B. Del C.S.B.*, 559 F.3d 999, 1010 (9th Cir. 2009) (holding that uncertain immigration status cannot undermine other considerations that weigh in favor of a “well-settled” finding).

determination.²⁰⁴ International courts have also followed suit,²⁰⁵ although the reasoning embraced by each court differs on a case-by-case basis.

1. The Ninth Circuit

In re B. Del C.S.B. is perhaps the most significant Article 12 immigration status decision to date and has formed the foundation for a host of district court decisions throughout the country.²⁰⁶ *B. Del C.S.B.* involved a mother and father who were both Mexican citizens.²⁰⁷ Neither had legal status in the United States, despite efforts by the mother's mother to gain such status.²⁰⁸ During the duration of their relationship, the couple illegally moved back and forth between the United States and Mexico numerous times.²⁰⁹ Eventually, the mother, while living in Mexico, gave birth to a daughter.²¹⁰ During the next few years, both parents illegally traveled back and forth between the United States and Mexico with their daughter in tow.²¹¹

Eventually, the parents' relationship soured, and the mother expressed a desire to permanently immigrate (illegally) to the United States with the daughter.²¹² The father agreed that the daughter could remain in the United States with the mother subject to a number of conditions—including the father being able to speak with the daughter on the telephone and to see her during school holidays.²¹³ After some time, the mother severed all contact with the father.²¹⁴ The father subsequently expended significant energy in pursuing a host of legal remedies to reestablish contact with his daughter.²¹⁵ Finally, the father was able to secure a meeting to initiate the Convention process; yet, he was forced to wait an additional seven months while his application was translated from Spanish to English.²¹⁶ More than a year

204. *See Lozano*, 697 F.3d at 45; *B. Del C.S.B.*, 559 F.3d at 1010. Based on the greater authority accorded to circuit court decisions, and their likely impact on an eventual United States Supreme Court discussion of the issue, this Note discusses them below in significantly greater detail than the district court cases cited in Parts II.A and II.B.

205. *See, e.g., C (a Child)*, [2006] EWHC (Fam) 1229, [55]–[57] (Eng.) (holding that a child is well-settled despite uncertain immigration status because the child is unlikely to be deported).

206. *See, e.g., Demaj*, 2012 WL 476168, at *4; *Edoho*, 2010 WL 3257480, at *6.

207. *B. Del C.S.B.*, 559 F.3d at 1003.

208. *Id.* at 1003 n.4.

209. *See id.* at 1003.

210. *See id.*

211. *See id.* at 1004.

212. *See id.* at 1004–05.

213. *See id.*

214. *See id.* at 1005.

215. *See id.* at 1006. These efforts included visiting the Mexican Office of Family Integration Services, and multiple trips to the Department of State for Protection of Minors. In doing so, the father was forced, on numerous occasions, to sleep outside of the building. *See id.*

216. *Id.* at 1006.

after his last contact with his daughter, the father submitted his application under the Convention to the Mexican Central Authority.²¹⁷

After receiving the application, the Mexican Central Authority “advised him not to take any further action, and to let the ‘long’ Convention process run its course.”²¹⁸ The Mexican Central Authority then transmitted the father’s application to the U.S. Central Authority, which, in turn, transmitted it to the NCMEC.²¹⁹ The NCMEC then forwarded a copy of the application to the Attorney General of California.²²⁰ Eventually, the NCMEC was able to obtain an address for the daughter in California, and the father subsequently filed his Convention petition in the Central District of California.²²¹

The district court granted the father’s petition based on, among other factors, the child’s uncertain immigration status in the United States.²²² Specifically, the court held that “[the mother] did not satisfy her burden of proving an Article 12 defense because [the daughter’s] unlawful immigration status precluded her from being settled in the United States.”²²³

The Ninth Circuit reversed the district court’s finding, holding that uncertain immigration status does not undermine an otherwise well-settled determination.²²⁴ The court noted that this particular question was one of first impression: May a court find that a child is not “settled” for purposes of Article 12 of the Convention because she does not have lawful immigration status?²²⁵

The court, in addressing this question, engaged in an exhaustive analysis, beginning with a consideration of whether any factors weighed in favor of a well-settled finding.²²⁶ The court noted that the daughter had attended the same school for multiple grades, had consistently recorded strong report cards and attendance, was bilingual, and participated in multiple extracurricular activities.²²⁷ Additionally, the child had resided in California for some time, and her environment was otherwise relatively stable.²²⁸

In determining how much weight to accord the mother and child’s uncertain immigration status, the court began by consulting the

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* It was believed, based on past information regarding the mother and daughter’s whereabouts, that both mother and daughter were living in California. *See id.* at 1006–07.

221. *Id.*

222. *See id.* at 1007.

223. *Id.* This decision reflects the rationale embraced by the courts discussed in Part II.A, wherein immigration status significantly undermined a well-settled finding.

224. *See id.* at 1015–16.

225. *See id.* at 1001–02.

226. *Id.* at 1009.

227. *Id.* at 1005–06.

228. *Id.*

Convention's text and history.²²⁹ The court considered the definition of "habitual resident," and determined that the term is to be interpreted broadly, with even unlawful or precarious residence possessing the ability to develop into habitual residence.²³⁰ The court applied the same reasoning to the term "settled," noting that, lacking an explicit definition, "settled" may apply to a person who has been resident in a country for a significant amount of time, notwithstanding an uncertain immigration status.²³¹ Thus, the court found that "[b]y acknowledging that an undocumented child may be habitually resident . . . we have already accepted the principle that a child may remain in a place in which he lacks legal status . . . because of his close ties to that country."²³² Ultimately, the court concluded that "[n]either text nor history suggests that lawful immigration status is a prerequisite, or even a factor of great significance, for a finding that a child is 'settled' in a new environment."²³³

Next, the court turned to case law in an attempt to gauge the appropriate role of immigration status in the well-settled determination.²³⁴ The court reasoned that "prior district court cases that have concluded that an undocumented child is not 'settled' have considered status as only one element among many pointing to a lack of significant ties to the United States."²³⁵ In doing so, the court relied on the reasoning in *C (a Child)*, a case from the United Kingdom.²³⁶ In that case, a British court granted little weight to the child's uncertain immigration status in finding the child to be otherwise well-settled.²³⁷ The sole countervailing factor against a finding that the child was well-settled was the uncertain immigration status of the mother and child.²³⁸ Following *C (a Child)*, the Ninth Circuit held that the child in the instant case "who has five years of stable residence in the United States, coupled with academic and interpersonal success here, may be 'settled' within the meaning of Article 12, despite her unlawful status."²³⁹ Her uncertain immigration status, therefore, was not enough to overturn the determination that she was otherwise well-settled.²⁴⁰

229. *See id.* at 1010.

230. *Id.* at 1010–11.

231. *Id.* The court noted, for example, that an undocumented infant that "knows no other home" is clearly settled in the new country, despite the infant's lack of immigration status. *Id.* at 1011.

232. *Id.*

233. *Id.* at 1010.

234. *See id.* at 1010–11.

235. *Id.* at 1011.

236. *Id.* at 1012; *see also infra* notes 295–310 and accompanying text.

237. In justifying its reliance on *C (a Child)*, the court noted that "in interpreting international treaties, 'the opinions of our sister signatories [are] entitled to considerable weight.'" *B. Del C.S.B.*, 559 F.3d at 1012 (quoting *Air France v. Saks*, 470 U.S. 392, 404 (1985)).

238. *See id.* at 1011.

239. *Id.* at 1012. The court also cited *Plyler v. Doe*, 457 U.S. 202 (1982), noting that illegal entry into the country, does not, under traditional criteria, necessarily bar a person from becoming domiciled in a particular state. *B. Del C.S.B.*, 559 F.3d at 1010–11.

240. *See id.* at 1015–16.

The court then turned to a policy discussion to further cement its opinion that immigration status has a negligible impact on the well-settled determination.²⁴¹ The court observed that many undocumented immigrants permanently live in the United States and never encounter any issues with the immigration authorities.²⁴² These undocumented workers often obtain regular employment, the court noted, and have successfully established lives in the United States, irrespective of occasional heightened sensitivity toward illegal immigration.²⁴³ Further, the court stated that these specific parties were unlikely to be deported due to the large number of undocumented immigrants living in the United States, and the general preference for deporting illegal aliens with a criminal background.²⁴⁴

The court in *B. Del C.S.B.* also conducted a detailed analysis of how immigration status might affect a child's future prospects in California.²⁴⁵ The court examined the benefits and protections that undocumented immigrants are frequently afforded under state and federal law.²⁴⁶ Specifically, the court cited a recent California federal case holding that the state cannot deny public education to children based on immigration status;²⁴⁷ the California Education Code, which permits undocumented immigrants to pay in-state tuition fees at California universities and community colleges;²⁴⁸ and a recent article noting that undocumented immigrants are now eligible for Medicaid, school breakfast and lunch programs, and nutritional programs in the United States.²⁴⁹

The court was careful, however, to measure these benefits and protections against the potential future issues that could arise from a child's uncertain immigration status, including the inability to obtain a driver's license, restricted access to college financial aid, poor employment prospects, and the general threat of deportation.²⁵⁰ Yet the court ultimately concluded that the Convention is concerned with the present, and any determination of future well-being is best left to the court conducting custody proceedings.²⁵¹

The court held, "We can see nothing in the Convention itself, in our case law, or in the practical reality of living in this country without documented

241. *Id.* at 1012 ("Third, we conclude that, on a practical level, it makes little sense to permit immigration status to serve as a determinative factor in the Article 12 'settled' analysis.").

242. *Id.*

243. *Id.*

244. *Id.*

245. *See id.* at 1012–13.

246. *See id.* at 1013.

247. *See id.* (citing *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1255–56 (C.D. Cal. 1997)).

248. *See id.* (citing CAL. EDUC. CODE § 68130.5(a)(4) (West 2002)).

249. *See id.* (citing TANYA BRODER, OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 4.3 (2007)). For an updated version of the report cited by the court, see TANYA BRODER & JONATHAN BLAZER, OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS (2011), available at <http://www.nilc.org/overview-immeligfedprograms.html>.

250. *See id.*

251. *Id.*

status, to persuade us that immigration status should ordinarily play a significant, let alone dispositive, role in the ‘settled’ inquiry.”²⁵² Specifically, the court stated that the immigration status of the child and mother are *only* relevant if there is an immediate, “concrete threat of deportation.”²⁵³ The undocumented status of both mother and child cannot undermine all the other considerations that weigh in favor of a well-settled finding.²⁵⁴ The court summarized its holding as such:

Where, as here, a child has lived and thrived in her home and school for over half of her life, and there is no reason to believe that she (or her undocumented parent) will suffer any imminent, negative consequences as a result of her unlawful status, it would be contrary to the Convention’s purpose of keeping a child in “the family and social environment in which its life has developed” to rely on immigration status as the basis for rejecting an Article 12 defense.²⁵⁵

2. The Second Circuit

In *Lozano*, the Second Circuit followed suit in all respects except one key aspect of the determination. *Lozano* concerned a mother and father, both originally from Colombia, who entered into a relationship in 2004 while they were living in London.²⁵⁶ Over the course of the relationship, Alvarez made various allegations of abuse against Lozano.²⁵⁷ Though they never married, the mother gave birth to a child in 2005, and the family lived together until 2008.²⁵⁸ During that time, the child developed a host of issues that may have been caused, to some degree, by the domestic disputes, including extreme shyness and bed-wetting.²⁵⁹ One day, instead of taking the child to nursery school, the mother fled with her daughter to a women’s shelter, where the two lived for approximately seven months.²⁶⁰ Eventually, both mother and child fled to New York to live with the mother’s sister.²⁶¹

Since they had British passports, the mother and daughter were allowed to enter the United States without a visa for up to ninety days.²⁶² In the months that followed, the child experienced dramatic behavioral improvements, was quite successful in school, and made several friends.²⁶³ Meanwhile, the father had made a number of attempts to locate both the

252. *Id.* at 1010.

253. *Id.* at 1009.

254. *Id.* at 1010.

255. *Id.* at 1013.

256. *Lozano v. Alvarez*, 697 F.3d 41, 45 (2d Cir. 2012), *petition for cert. filed*, No. 12-820 (U.S. Jan. 2, 2013).

257. *Id.*

258. *See id.* at 45–46.

259. *Id.* at 46.

260. *Id.*

261. *Id.*

262. *Id.*

263. *See id.*

mother and daughter within the United Kingdom.²⁶⁴ Eventually, the father filed an application for return of the child with the English and Welsh Central Authority, which then forwarded it to the U.S. Department of State Office of Children's Issues.²⁶⁵ The father thereafter filed a petition for the return of the child in the Southern District of New York.²⁶⁶

The district court held evidentiary hearings at which, among other things, it heard expert testimony regarding the child's various behavioral issues and improvements since moving to the United States.²⁶⁷ The court first held that the father had made out a prima facie case of wrongful retention by establishing that (1) the child was a habitual resident in the United Kingdom; (2) the mother's wrongful removal breached the father's custody rights; and (3) the father was exercising those custody rights at the time the child was abducted.²⁶⁸ The district court ultimately denied the application, however, holding that the child was now well-settled in the United States.²⁶⁹ In doing so, the court considered a number of factors, including the duration of the child's residence in the United States, her various social, behavioral and academic improvements, and the child's family situation in New York.²⁷⁰ The court also considered the mother and child's immigration status—specifically, that both had overstayed their visas and were residing in the United States illegally.²⁷¹ The court explicitly rejected the argument that immigration status precludes a well-settled finding as a matter of law.²⁷² Instead, the court adopted a forward-looking approach, noting that there was little to suggest that the child's immigration status

264. *See id.* at 47. The father contacted one of the mother's other sisters residing in London, who denied any knowledge of the mother's whereabouts. *Id.* The father then filed an application with a British court to obtain regular contact with the child. *Id.* He also submitted orders to the mother's relatives and former counsel, as well as a number of other parties, including the child's teachers and doctors, seeking information regarding the mother and child's whereabouts. *See id.*

265. *Id.*

266. *Id.*

267. *See id.*

268. *Id.* at 47–48.

269. *Id.* at 48. The court also rejected the father's argument that equitable tolling should apply so as to render any affirmative defenses moot. *Id.* Specifically, the district court stated that the

one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling. A petitioner is not barred from bringing a petition after the one-year period has lapsed; rather, after that point, a court must consider the countervailing consideration that the child may now be better served remaining where he or she is currently located.

In re Lozano, 809 F. Supp. 2d 197, 228 (S.D.N.Y. 2011), *aff'd sub nom. Lozano v. Alvarez*, 697 F.3d 41, 45 (2d Cir. 2012), *petition for cert. filed*, No. 12-820 (U.S. Jan. 2, 2013).

270. *Lozano*, 809 F. Supp. 2d at 231, 234.

271. *See id.* at 233. The mother indicated during the hearing that she had spoken with immigration authorities about the possibility of being sponsored by her sister. *Lozano*, 697 F.3d at 46.

272. *See In re Lozano*, 809 F. Supp. 2d at 232–33.

would, now or in the future, significantly affect the stability of the child's life in New York.²⁷³

The father subsequently filed a timely notice of appeal²⁷⁴ and, prior to oral argument, the Second Circuit requested that the U.S. Government submit an amicus brief.²⁷⁵ Specifically, the court asked the government to address the equitable tolling issue, as well as the proper degree of weight to be accorded to immigration status when determining whether a child is settled within the meaning of Article 12.²⁷⁶ The government thereafter submitted a letter brief recommending that the court consider the child's immigration status as one factor in the court's determination of whether the child was now settled in her new environment.²⁷⁷ The government, in arguing for a reduced role for immigration status in the determination, relied on many of the cases discussed in this Note, including a number of international decisions.²⁷⁸ The government did, however, advocate for a forward-looking approach in determining how much weight should ultimately be accorded to immigration status in the determination.²⁷⁹

In rendering its decision, the Second Circuit addressed two questions of first impression: Should the one-year period be equitably tolled, and can a child who lacks legal immigration status nevertheless be found to be well-settled under Article 12.²⁸⁰ As to the latter issue, the court began its analysis with the text of the Convention, noting the great degree of weight accorded to the statutory language and legislative history.²⁸¹ In considering

273. *Id.* at 233. The district court also considered whether it should exercise its discretionary power, under Article 18, to order return of the child despite the existence of a valid affirmative defense. *See id.* at 234–35. In declining to do so, the court focused on the fact that the child had experienced dramatic social and behavioral improvement since moving to the United States, and ordering a return of the child to the United Kingdom risked exposing the child to additional trauma. *Id.* The court, in employing this reasoning, essentially asserted a sua sponte “grave risk” affirmative defense. *See supra* note 68 and accompanying text.

274. *Lozano*, 697 F.3d at 49.

275. *Id.*

276. *Id.*

277. Letter Brief for the United States as Amicus Curiae at 2, *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) (No. 11-2224-cv). The government also recommended that the court find that “[e]quitable tolling does not apply to the one-year period under Article 12; instead, the court retains equitable discretion to order a child’s return at any time.” *Id.*

278. *See id.* at 13–15 (citing *A. v. M.* (2002), 209 N.S.R. 2d 248 (Can. N.S. C.A.); *C (a Child)*, [2006] EWHC (Fam) 1229 (Eng.)).

279. *See id.* (noting that each situation must be considered on a case-by-case basis and the likelihood of deportation in the future may impact the “well-settled” determination). The government also stated that “[t]he Convention’s overarching focus on a child’s well-being suggests that this [well-settled] inquiry concerns a child’s practical circumstances.” *Id.*

280. *Lozano*, 697 F.3d at 45. On the tolling issue, the court considered the Convention’s plain language, history, the government’s arguments in its amicus brief, and other relevant circuit court decisions. The court concluded that the one-year period was not subject to equitable tolling, and therefore the mother in *Lozano* was free to assert the Article 12 affirmative defense. *See id.* at 50–55.

281. *Id.* at 56–57. The court specifically stated, earlier in the decision, that any treaty analysis begins with a close examination of the text and history of the treaty and that, while general rules of statutory construction may be considered, the court must look to the history

how to define “settled,” the court stated that, “[w]here a term is undefined in a statute, ‘we normally construe it . . . with its ordinary or natural meaning.’”²⁸² In this case, the court determined that “settled,” as it is used in the statute, suggests a “stable and permanent relocation of the child.”²⁸³ This term is informed by the statute as a whole; despite the Convention’s goals to ensure a prompt return of the child, the drafters recognized that there may come a point where returning the child to her habitual residence would not be in the child’s best interests.²⁸⁴ Thus, the court concluded that the child is settled where she has developed “significant emotional and physical connections demonstrating security, stability, and permanence in [her] new environment.”²⁸⁵

In making a well-settled determination, the court recognized (as have many courts that have considered the issue) that it may consider any potentially relevant factor, including a child’s immigration status.²⁸⁶ The court, however, determined that the weight accorded to immigration status will inevitably vary for a number of reasons, including the likelihood that the child will be able to obtain legal resident status in the United States, the child’s age, and the extent to which the child’s future prospects will be impinged by her uncertain status.²⁸⁷ Yet the court ultimately recognized, in endorsing the district court’s decision, that this uncertainty must be weighed against a number of other factors suggesting the child is well-settled.²⁸⁸ In doing so, the court concluded that courts need not give significant weight to a child’s immigration status when making an Article 12 determination.²⁸⁹ On a case-by-case basis, the weight accorded to immigration status—insofar as it relates to a child’s future prospects—will vary depending on, for example, the likelihood of deportation or the existence of significant barriers to the child’s obtaining government benefits.²⁹⁰ Yet the Second Circuit, following the general reasoning of the Ninth Circuit in *B. Del*

of the treaty, the negotiations, and the practical construction adopted by the signatory parties in determining the treaty’s meaning. *Id.* at 50.

282. *Id.* at 56 (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 56–57.

287. *Id.* at 57. Though the Second and Ninth Circuits ultimately reach the same conclusion regarding the appropriate degree of weight accorded to immigration status in the two cases addressed in this Note (*Lozano* and *B. Del C.S.B.*), they differ markedly in their analysis of how future considerations impact the determination. While the Ninth Circuit held that the Convention was only concerned with the present and not with the ultimate impact a well-settled finding might have on a child’s future prospects, *In re B. Del C.S.B.*, 559 F.3d 999, 1013 (9th Cir. 2009), the Second Circuit recognized that the weight accorded to immigration status will ultimately vary on a case-by-case basis depending on the protections and detriments associated with uncertain immigration status. *Lozano*, 697 F.3d at 57.

288. *Lozano*, 697 F.3d at 58.

289. *See id.* at 45.

290. *See id.* at 57. The court noted, for example, that the importance of immigration status will vary depending in part upon “the extent to which the child will be harmed by her inability to receive certain government benefits.” *Id.*

C.S.B., ultimately opted to adopt an approach in which immigration status is accorded relatively minimal weight in the well-settled determination.²⁹¹ The court declined, however, “to impose a categorical rule that the weight to be given to a child’s immigration status var[y] only in accordance with the threat of deportation.”²⁹² The left-behind father has filed a petition for a writ of certiorari in the Supreme Court.²⁹³ The Court has not yet addressed the petition, but has requested that the Solicitor General provide advice in the case.²⁹⁴

3. The United Kingdom

International courts have adopted similar interpretations regarding the role of immigration status in the well-settled determination. *C (a Child)*,²⁹⁵ a British case, presents just such a scenario. In *C (a Child)*, a mother and daughter fled from the United States to England amidst allegations that the father had sexually abused another one of his daughters.²⁹⁶ The mother had recently remarried a man living in England.²⁹⁷ Shortly thereafter, the father obtained a warrant for the mother’s arrest for violation of a contact order between the father and daughter, and the U.S. court granted the father custody of the child.²⁹⁸ Nearly five years later, the father was able to locate the mother and child in England, and subsequently filed a petition for return of the child.²⁹⁹ At the time, the child had been going to school in England for a number of years and had many British friends.³⁰⁰ The mother and daughter, however, were still residing in England illegally.³⁰¹

In conducting a well-settled Article 12 analysis, the British High Court of Justice, Family Division, considered a two-prong test with both physical and emotional/psychological components.³⁰² The court noted that, as to the

291. *See id.* at 58 (finding a child to be well-settled despite an uncertain immigration status).

292. *Id.* at 58 n.18. The court stated that it declined to impose such a rule due to the possibility that instances may arise where immigration status significantly impacts the child’s future, despite the lack of a threat of deportation. *See id.*

293. Petition for Writ of Certiorari, *Lozano v. Alvarez*, No. 12-820 (U.S. Jan. 2, 2013).

294. Order Inviting the Solicitor General To File Brief As Amicus Curiae, *Lozano*, No. 12-820 (U.S. Mar. 18, 2013).

295. *C (a Child)*, [2006] EWHC (Fam) 1229 (Eng.).

296. *Id.* at [1], [4]–[5].

297. *Id.* at [5].

298. *Id.* at [6]–[7].

299. *See id.* at [1]–[2]. All contact had been lost between the parties after the mother and daughter fled to England. The father learned of the child’s whereabouts while conducting an internet search and happening upon an article on school bullying in which the daughter was cited as a victim. *Id.* at [2], [10].

300. *Id.* at [21].

301. *Id.* at [28]. Shortly after moving to England, the mother’s new husband, under the guise of returning to the United States to fetch the mother’s remaining child, abandoned the mother and daughter. *Id.* at [20]. The other daughter was able to eventually move to England and, after living with the mother and daughter for some time, married and moved to a house in the same town as the mother and daughter. *Id.*

302. *Id.* at [46]. (“The word ‘settled’ has two constituents. The first is more than mere adjustment to new surroundings; it involves a physical element of relating to, being

first prong, the child was indeed settled in England—she was well-integrated into the community, had been living in the same place for some time, and had made a number of permanent relationships.³⁰³ The court recognized that the key question concerned the stability inherent in the second prong: “So far as the future is concerned, the only question mark hanging over the continued residence of [the daughter] and her mother where they presently are, is their immigration status.”³⁰⁴ In evaluating how much weight to accord immigration status, the court stated that there must be a showing of stability into the future such that the child’s “position . . . [is] as permanent as anything in life can be said to be permanent.”³⁰⁵

The court concluded that despite an ongoing risk of deportation, the mother and daughter had been given no warning or notice that they were likely to be deported.³⁰⁶ Additionally, the mother’s application for leave to remain was still pending.³⁰⁷ The court noted that there was a strong likelihood that the immigration authorities were aware of the mother and daughter’s presence in England and had opted not to deport them.³⁰⁸ Therefore, the court reasoned, it was unlikely that deportation would occur in the future, and thus the mother and daughter’s uncertain immigration status should be granted minimal weight.³⁰⁹ The court ultimately found that the child was well-settled in England and declined to issue a return order.³¹⁰

The aforementioned cases each come to the conclusion that immigration status should play a relatively minor role in the well-settled determination.³¹¹ Whether based on close scrutiny of the Convention and its history,³¹² decisions of other courts,³¹³ or practical considerations,³¹⁴ the Second and Ninth Circuits and the British High Court of Justice, Family Division, each recognized that, though the mother and child in each case lacked legal immigration status, other factors dwarfed any concerns regarding immigration uncertainty.³¹⁵ Each found that there was relatively

established in, a community, and an environment. The second is an emotional and psychological constituent denoting security and stability. It must be shown that the present situation imports stability when looking into the future.”).

303. *Id.* at [54].

304. *Id.* at [56].

305. *Id.*

306. *Id.* at [57].

307. *Id.* at [56].

308. *See id.* at [57].

309. *See id.*

310. *See id.* at [59].

311. *See Lozano v. Alvarez*, 697 F.3d 41, 45 (2d Cir. 2012) (“[C]ourts need not give controlling weight to a child’s immigration status.”); *In re B. Del C.S.B.*, 559 F.3d 999, 1010 (9th Cir. 2009) (“We can see nothing . . . to persuade us that immigration status should ordinarily play a significant, let alone dispositive, role in the ‘settled’ inquiry.”); *C (a Child)*, [2006] EWHC (Fam) [57] (finding that an uncertain immigration status was not significant factor in a “well-settled” determination).

312. *See Lozano*, 697 F.3d at 56–57; *B. Del C.S.B.*, 559 F.3d at 1010–11.

313. *See B. Del C.S.B.*, 559 F.3d at 1011–12; *C (a Child)*, [2006] EWHC (Fam) [56].

314. *See B. Del C.S.B.*, 559 F.3d at 1012.

315. *See Lozano*, 697 F.3d at 57; *B. Del C.S.B.*, 559 F.3d at 1009; *C (a Child)*, [2006] EWHC (Fam) [54]–[57].

little evidence suggesting that the child faced a threat of deportation.³¹⁶ In addition, both the Second and Ninth Circuits suggested that the child's immigration status would likely have little effect on the child's future prospects—a forward-looking approach that was not preclusive of a well-settled finding.³¹⁷

III. FINDING A COMPROMISE: MANY OPINIONS, TWO CIRCUITS, ONE APPROACH

Each of the approaches discussed in Part II—granting immigration status considerable weight, relatively equal weight, or relatively little weight in the well-settled determination—presents a compelling case for how immigration status should be analyzed in an Article 12 case. Indeed, it might seem logical that uncertain immigration status should virtually preclude a well-settled determination, as the courts in Part II.A contend. How can a child ever be truly settled if she faces at least a theoretical threat of deportation? Yet the courts in Part II.C, after engaging in a detailed analysis of the Convention's history and purpose, case law, and practical considerations, came to the opposite conclusion: immigration status should play a relatively minor role in the determination, and likely will not (at least in *B. Del C.S.B.* and *Lozano*) have significant effects on the child's future prospects.

It is clear that courts across the country—indeed, across the world—are split on how to approach this nuanced and important issue. Part III discusses a potential compromise, and advocates for a uniform approach to the issue that ultimately accords immigration status relatively minor consideration, but still retains a forward-looking evaluation of its impact on the child's future. Specifically, this approach would adopt the findings of the Second and Ninth Circuits insofar as they advocate for relatively minimal weight to be accorded to immigration status in an Article 12 determination. Yet, as the Second Circuit recognized in *Lozano*, the degree to which immigration status should factor into the Article 12 analysis ultimately hinges on the protections available, on a case-by-case basis, to ensure that a child has the opportunity to fully prosper in a new environment.

A. *The First Prong: Immigration Status Should Be Accorded Minimal Weight*

The first rule embraced by this approach dictates that courts grant immigration status minimal weight in the well-settled determination. The Ninth Circuit, in particular, conducts an exhaustive analysis of why this should be the case,³¹⁸ and the Second Circuit essentially adopts such an

316. See *Lozano*, 697 F.3d at 58; *B. Del C.S.B.*, 559 F.3d at 1012; *C (a Child)*, [2006] EWHC (Fam) [57].

317. See *Lozano*, 697 F.3d at 57–58; *B. Del C.S.B.*, 559 F.3d at 1013.

318. See *supra* notes 229–55 and accompanying text.

approach, but does so with more brevity.³¹⁹ Beginning with the Convention's text and history, the Ninth Circuit makes the argument that the Convention drafters did not intend for immigration status to play a particularly significant role in the well-settled determination.³²⁰ Relying on the ambiguity of the "settled" definition, as well as the Convention's overtones stressing the best interests of the child, both circuits determined that a statutory analysis leads to a conclusion that immigration status should be considered as at least an equally weighted factor, if not an insignificant one.³²¹

Perhaps one of the most compelling arguments for granting immigration status little weight in the well-settled determination is that undocumented immigrants, specifically those living peacefully in the United States, face a relatively low risk of deportation.³²² As the Ninth Circuit makes clear, millions of undocumented immigrants live their entire lives in the United States without ever encountering a problem with the immigration authorities.³²³ The court in *C (a Child)* came to a similar conclusion (albeit from a slightly different angle). Where the immigration authorities knew of the parent and child's illegal status and still opted not to take action, the court was free to conclude that it was unlikely that the parent and child would face deportation.³²⁴

Indeed, perhaps the strongest argument in favor of such an approach has not been explicitly articulated by the courts discussed above, but is essentially inherent in their discussion of the well-settled factors: that, at the time of consideration, immigration status had not prevented the child from developing significant connections and succeeding in a new environment. Despite an uncertain immigration status, the daughter in *B. Del C.S.B.* had attended the same school for multiple years, had consistently strong report cards and regular attendance, and excelled in various extracurricular activities.³²⁵ In *Lozano*, the child had made dramatic behavioral advancements, made a number of new friends, and was doing well in school.³²⁶ Even in those cases that ultimately grant immigration status a dispositive role in the well-settled determination, courts do not hesitate to describe the significant advances the children have made in their new environment.³²⁷ Perhaps the best evidence that immigration status should be granted minimal weight in the determination, therefore, is that it has, in case after case, presented virtually no hindrance to the child's ability to excel in a new environment.³²⁸

319. See *supra* notes 281–91 and accompanying text.

320. See *supra* notes 229–33 and accompanying text.

321. See *supra* notes 229–33, 281–91 and accompanying text.

322. See *supra* notes 241–44 and accompanying text.

323. See *supra* notes 241–44 and accompanying text.

324. See *supra* notes 307–10 and accompanying text.

325. See *supra* notes 227–28 and accompanying text.

326. See *supra* note 270 and accompanying text.

327. See, e.g., *supra* note 128 and accompanying text.

328. See, e.g., *supra* notes 181, 227–28, 263 and accompanying text.

B. The Second Prong: A Forward-Looking, Case-by-Case Approach

Despite the various arguments discussed above, it is possible to imagine a situation in which, though the child has suffered no ill effects to date because of her uncertain immigration status and does not face any immediate threat of deportation, the child is significantly disadvantaged in the future because of her immigration status.³²⁹ Obviously, such a forward-looking approach assumes a number of things—including, for example, that the child is unable to obtain legal status in the interim. Consideration of these potential disadvantages, however, is consistent with the Convention's goals of protecting the child's best interests. Therefore, the second aspect of the approach advocated in this Note mandates that courts generally accord immigration status little weight, except where that uncertain immigration status is likely to affect the child's future prospects, irrespective of a deportation risk.

The Ninth Circuit presented a logical template of how to conduct such an analysis in *B. Del C.S.B.*, where it specifically discussed how immigration status may impact a child's future prospects.³³⁰ The court noted that the child faced significant barriers in obtaining a driver's license and access to college financial aid.³³¹ It also considered, however, the various protections implemented under state and federal law to allow undocumented immigrants to flourish in the United States.³³² Specifically, the court noted California educational codes permitting undocumented immigrants to pay reduced fees for state universities, and recent trends across the country broadening access to Medicaid, state nutritional programs, and subsidies for school lunches.³³³ The court ultimately concluded, however, that the settled inquiry is purely concerned with the present.³³⁴

Thus, though the Ninth Circuit recognized the potential value of considering the child's future prospects, it declined to ultimately consider how they might be impacted by the child's uncertain immigration status in conducting a well-settled analysis. The Second Circuit, though highly deferential to the Ninth Circuit's findings, declined to adopt this particular aspect of the Ninth Circuit decision and opted instead to suggest an approach more in line with that suggested by this Note. The Second Circuit asserted that the weight ascribed to a child's immigration status will necessarily vary on a case-by-case basis

because we can imagine instances where immigration status may be important even if the threat of removal is negligible, we decline to impose

329. *See supra* notes 250, 287 and accompanying text.

330. *See supra* notes 245–51 and accompanying text.

331. *See supra* note 250 and accompanying text.

332. *See supra* notes 246–49 and accompanying text.

333. *See supra* notes 246–49 and accompanying text.

334. *See supra* note 251 and accompanying text.

a categorical rule that the weight to be given a child's immigration status varies only in accordance with the threat of deportation.³³⁵

The Second Circuit recognized that whether the child will be precluded from receiving government benefits, for example, may weigh on the immigration decision, despite a finding that the child was not facing a significant deportation risk.³³⁶

As the U.S. government notes in its amicus brief in *Lozano*, “[t]he Convention’s overarching focus on a child’s well-being suggests that this [well-settled] inquiry concerns a child’s practical circumstances.”³³⁷ A forward-looking approach that grants additional weight to immigration status where it appears likely that it will significantly impact the child’s ability to flourish in their new country is consistent with the purpose of the Convention.

Thus, consider two scenarios under the approach proposed by this Note: In the first, the child faces little deportation risk and state and federal protections exist guaranteeing undocumented immigrants significant rights to education, medical care, and the like. In the second, the child again faces little deportation risk, but there are few, if any, state and federal protections in place to protect the rights of undocumented immigrants. Therefore, in the second scenario, it appears likely that the child will be unable to access the same rights as those guaranteed to them in their country of origin. Under the approach outlined in this Note, a court considering how immigration status affects a well-settled determination would grant immigration status significantly more weight in the second scenario. Therefore, immigration status, by default, plays a relatively minimal role in the Article 12 analysis, except where it is likely to affect the child’s future prospects.

CONCLUSION

The role immigration status plays in the Article 12 determination ultimately has a major and tangible effect on the life of the child in question. The issue addressed by this Note is not a theoretical procedural scenario or an arcane aspect of an obscure area of law, but a significant debate with far-reaching consequences. Whether or not to order the return of a child—where that could mean a return to a potentially abusive parent or an unsettled environment—is no small charge. Yet for the most part, courts have heeded the Convention’s purpose: protecting the best interests of the child. The Supreme Court should grant certiorari to an Article 12 case to promulgate a bright-line rule, such as the one suggested by this Note. Such a rule would preserve the Convention’s mandate by reflecting

335. *Lozano v. Alvarez*, 697 F.3d 41, 58 n.18 (2d Cir. 2012), *petition for cert. filed*, No. 12-820 (U.S. Jan. 2, 2013); *see also supra* note 292 and accompanying text.

336. *See supra* notes 286–92 and accompanying text.

337. Letter Brief for the United States as Amicus Curiae at 14, *Lozano*, 697 F.3d 41 (No. 11-2224-cv).

an overarching concern for the child's welfare, both at the time of the well-settled determination and into the future.