United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 00-6066

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FELIX BLONDIN,

Petitioner-Appellant,

- v. -

MARTHE DUBOIS,

Defendant-Appellee.

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**BRIEF FOR AMICUS CURIAE UNITED STATES OF AMERICA**

**SUPPORTING PETITIONER-APPELLANT AND SUPPORTING REVERSAL**

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**Preliminary Statement**

Pursuant to 28 U.S.C. § 517 and Rule 29 of the Federal Rules of Appellate Procedure, the United States submits this brief as amicus curiae to express its views on the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, implemented by the International Child Abduction Remedies Act (the "ICARA"), 42 U.S.C. §§ 11601-11610.

**INTEREST OF THE UNITED STATES**

The Hague Convention is designed 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.” Hague Convention Preamble. The Department of State has long been involved in the difficult human, legal, and diplomatic problems surrounding international parental child abduction. The Department of State represented the United States at the negotiation of the Convention, and was instrumental in proposing its implementing legislation to Congress. (A237). The Department of State has also attended periodic international meetings to review the operation of the Convention. (A237-38).

The Hague Convention requires each party State to designate a "Central Authority" to cooperate with its counterparts in other party States to "secure the prompt return of children and to achieve the other objects of this Convention." Hague Convention, arts. 6, 7. The Department of States' Office of Children's Issues is the designated Central Authority in this country. 22 C.F.R. § 94.2.\* To facilitate the proper functioning of the Convention, the Office of Children's Issues carries out an active program of communications with private applicants, other Central Authorities, and, where appropriate, courts in the United States and abroad. (A238).

The Department of State has a strong interest in promoting the proper operation of the Convention to ensure that the United States complies with international treaty obligations. (Id.). To the extent that other party States consider erroneous the United States courts’ application of exceptions to return under the Convention, the United States may find its views on questions of Convention interpretation accorded less weight. Blondin v. Dubois, 189 F.3d 240, 248 & n.7 (2d Cir. 1999) ("Blondin II"). As succinctly stated by the Hague Convention's official reporter, in language adopted by this Court, any "'systematic invocation of [these] exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.'" Id. at 246 (quoting Elisa Perez-Vera, Explanatory Report: Hague Conference on Private International Law, in 3 Acts and Documents of the Fourteenth Session 426 (1980) ("Perez-Vera Report")). The standards applied in United States courts will thus inevitably influence the standards we can demand from other countries with respect to returning children to the United States.\* (A238).

In sum, the United States Department of State has a substantial interest in ensuring that the Convention is interpreted correctly in the courts of this country. Moreover, in light of the Department of State's involvement in the negotiation and operation of the Convention, the Department's interpretation is entitled to substantial deference. See Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982).

**Issues Presented for Review**

The United States will address the following:

1.Whether, in refusing to return two abducted children to France, the district court misconstrued the exception to return under Article 13(b) of the Hague Convention.

2.Whether the district court erred in taking into account the views of one of the children, who is eight years old.

**STATEMENT OF THE CASE**

**A. The Hague Convention**

The Hague Convention was adopted to deter parents from abducting children across international boundaries in the hope of securing a court sympathetic to their position regarding custody. H.R. Rep. No. 525, 100th Cong., 2d Sess. 1-2 (1988), reprinted in 1988 U.S.C.C.A.N. 386, 386-87; see also Blondin II, 189 F.3d at 246. The Convention applies to all children under sixteen habitually resident in any of the party States. Hague Convention, art. 4. Both the United States and France are parties to the Convention. Blondin II, 189 F.3d at 244.

Under the Convention framework, "'a United States District Court has the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim.'" Blondin II, 189 F.3d at 245 (quoting Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993) ("Friedrich I"), and citing Hague Convention, arts. 16 and 19); see also 42 U.S.C. § 11602(b)(4). To obtain return of a child to its country of habitual residence, the person seeking return must prove only that the abduction was "wrongful" within the meaning of the Convention. Blondin II, 189 F.3d at 245 (citing 42 U.S.C. § 11603(e)(1)(A)). Once wrongful removal is established, the child must be promptly returned unless one of four narrow exceptions set forth in the Convention applies. Id. (citing Friedrich v. Friedrich, 78 F.3d 1060, 1067 (6th Cir. 1996) ("Friedrich II"), and 42 U.S.C. § 11601(a)(4)).

Of the four narrow exceptions to return, the exception relevant to this action permits a court to refuse return where the abductor demonstrates by clear and convincing evidence that "'there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'" Blondin II, 189 F.3d at 245 (quoting Hague Convention, art. 13(b), and citing 42 U.S.C. § 11603(e)(2)(A) for "clear and convincing" standard). In addition to the four stated exceptions, the Convention also permits a Court to "'refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.'" Id. at 246 n.3 (quoting Hague Convention, art. 13).

Each of the four exceptions to return, as well as the provision for taking account of an older child's objection, must be construed narrowly to avoid frustration of the Convention's purpose. Id. Thus, even if an action falls within an exception to return, the court may nonetheless order return if return is consistent with the interests represented by that exception, and the court should look for ways to order return. Id. at 246 n.4, 249-50.

**B.Prior Proceedings**

**1.Facts**

As initially found by the district court, the facts regarding the children's lives in France are in substance as follows: Marthe Dubois and Felix Blondin, French nationals who have never married, began living together in France after 1990. Blondin v. Dubois, 19 F. Supp. 2d 123, 124 (S.D.N.Y. 1998) ("Blondin I"). Marie-Eline was born to them in 1991, id., and Francois in 1995, id. at 125. Both children were born in France and resided in France with Dubois, her older son, Crispin, and Blondin, until Dubois brought them to the United States in August 1997 without the knowledge or consent of Blondin. Id. at 124-25.

From 1991 through 1993, Blondin beat Dubois on various occasions, including when she was holding Marie-Eline, and at one point wrapped an electrical cord around Marie-Eline’s neck and threatened to kill Marie-Eline and Dubois. Id. at 124. During 1992 and 1993, Dubois and Marie-Eline periodically lived in a series of battered women’s shelters. Id. at 124-25. In 1993, apparently during a separation from Dubois, Blondin applied for custody of Marie-Eline in a French court. Id. at 125. In December 1993, Blondin and Dubois reconciled, and the French court terminated the custody case with an order giving custody rights to both parents, and indicating that the principal residence of the child would be with the father, while the mother would have visiting and sheltering rights. Id.

After the reconciliation, Dubois started living with Blondin again, the physical abuse resumed, and Francois was born. Id. Dubois once threatened to throw Francois out the window and often threatened to "kill everyone." Id. In August 1997, Dubois forged Blondin’s signature on passport applications for the children and brought the children to the United States without informing Blondin. Id.

**2.Court Proceedings**

On June 19, 1998, Blondin filed a petition under the Convention seeking the children's return to France. Blondin I, 19 F. Supp. 2d at 126. On August 17, 1998, the district court dismissed Blondin’s petition, denying return of the children to France under Article 13(b) of the Convention. Id. at 127-29. The holding denying return was based primarily on a "grave risk of harm" of abuse by Blondin. Id. at 127-28. In addition, the district court noted that the children appeared to be well-settled in the United States. Id. at 123. Without making a finding whether Marie-Eline had reached a sufficient age and maturity to have her views considered, see Hague Convention, art. 13, the district court also noted that the child expressed a preference for remaining in the United States, id. at 128-29.

On August 17, 1999, this Court vacated the district court's judgment and remanded the action with the direction that, in applying the Article 13(b) exception to return based on grave risk of harm, the district court consider "the range of remedies that might allow both the return of the children to their home country and their protection from harm, pending a custody award in due course by a French court with proper jurisdiction." Blondin II, 189 F.3d at 249. This conclusion was premised on the Court's review of the Hague Convention's purposes, and, in particular, the Convention's goal of having children returned to their place of habitual residence for custody determinations. This Court thus held that, in cases under the Hague Convention, courts should make every effort to explore ways to protect children from harm "while still honoring the important treaty commitment to allow custodial determinations to be made -- if at all possible -- by the court of the child's home country." Id. at 248.

This Court did not disturb the factual findings regarding Blondin's abuse, and acknowledged the district court's conclusion that returning Marie-Eline and Francois to Blondin's custody would expose the children to a "grave risk of harm" under the Convention. Id. However, this Court made clear that the "other two ancillary considerations" articulated by the district court, namely, that Marie-Eline expressed a preference to remain here, and that both children appeared well-settled, were not appropriately relied upon under Article 13(b). Id. at 247. With respect to Marie-Eline's views, this Court held that consideration of a child's views on return was a separate matter that was not part of a "grave risk" analysis, and stated that, before considering such views, a court would have to make a finding that the child had obtained an appropriate degree of age and maturity. Id. Similarly, this Court found that a child's becoming "well-settled" was a separate exception, governed by Article 12 of the Convention and requiring as a predicate that the children be in the receiving State more than one year before the filing of a petition for return. Id. The Court commented that it would not rule out the possibility that a child could become so deeply rooted in the United States that return would then pose a "grave risk" of harm within the meaning of Article 13. Id. However, the Court also noted that the record before it did not present such a case. Id.

heir country of habitual residence.

While expert testimony addressing whether grave psychological harm might follow from return to a particular custodian or specific living situation may be relevant under Article 13(b), the type of testimony credited by the district court in this case was addressed to which country the children would fare better in for purposes of their long-term psychological health, even on the assumption that the French courts would protect them from future abuse by their father. Indeed, the psychiatrist giving this testimony described his own view of his role as follows: “We were here to deal with the children’s best interests at the Court’s request.” (A367). Such evidence is addressed to the issue of custody, and is for the courts of the country of the children's habitual residence. It has little relevance to the question of whether children should be returned under the Convention, even where allegations of abuse are present. See Friedrich II, 78 F.3d at 1067, 1069; In re Walsh, 31 F. Supp. at 206; Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 850-51 (Ky. Ct. App. 1999), petition for cert. pending, No. 99-1496 (U.S.)\*; Tahan v. Duquette, 259 N.J. Super. 328, 333-35 (N.J. Super. 1992); compare Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 461-62 (D. Md. 1999) (relying on similar type of psychological evidence to find exception to return, but relying on now-vacated opinion in Blondin I); Krishna v. Krishna, No. C 97-0021, 1997 U.S. Dist. LEXIS 4706, at \*9-10 (N.D. Ca. Apr. 11, 1997) (refusing return that would put child back into psychologically damaging environment of prior abuse, but also finding that removal was not "wrongful" where father acquiesced in child's leaving country).

In sum, the district court relied on testimony that the children would suffer grave psychological harm not from return to any specific abusive or otherwise intolerable situation, but merely from return to the country of France, where past abuse had occurred, and from custody proceedings there. 78 F. Supp. 2d at 296-97. Such a finding cannot alone justify relief under the narrow exception to return contemplated by Article 13(b).\*

In comparable circumstances, the United States would expect the French courts to return children to our system for an appropriate custody determination in our courts. The district court’s failure to return the children to France in this action erodes the system of trust and cooperation essential to the functioning of the Hague Convention and potentially opens the door to unregulated and uncontrollable international abductions in child custody matters.\*\*

**C.The District Court Incorrectly Analyzed, as a Legal Matter,**

**Whether Marie-Eline Objected to Return and Whether**

**She Has Attained a Sufficient Age or Degree of Maturity**

**to Have Any Such Objection Given Effect**

At the December 20, 1999 hearing, the district court heard evidence to determine whether Marie-Eline had, at age eight, attained an age and degree of maturity such that it would be appropriate to take account of her objection to return. The district court then played with Marie-Eline and Francois in Chambers. Based on that playtime, the district court reported: “Marie-Eline explicitly stated that she does not want to return to France because she does not want to be subjected to further physical and emotional abuse at the hands of her father.” Blondin III, 78 F. Supp. 2d at 296. The district court considered this an “objection to being returned to France.” Id. The court then noted that it considered the child's "views" as only one of several reasons why it was invoking Article 13(b). Id. This was an erroneous application of the standard for taking account of an older child's objection to return.

**1.Marie-Eline Did Not Express an “Objection to Return” Within the Meaning of the Convention**

As this Court stated in its initial opinion, that Marie-Eline may have expressed a preference to remain in the United States is not appropriately relied upon by a court when applying the exception to return under Article 13(b) of the Convention. Blondin II, 189 F.3d at 247. Rather, "[t]he Convention includes a separate provision allowing the court to take into account a child's objection to being returned 'if [the court] finds that the child . . . has obtained an age and degree of maturity at which it is appropriate to take account of its views.'" Id. (quoting Hague Convention, art. 13) (emphases added). This provision does not contemplate a general airing of a child's "views" as part of an Article 13(b) analysis of "grave risk"; rather, it permits, although does not require, a court to refuse return based on the separate ground of an older child's maturely considered objection to return. The district court correctly recognized that Marie-Eline's views were not sufficiently "dispositive" to permit non-return under that provision alone. Id. at 296.

Moreover, Marie-Eline did not express an "objection" to return within the meaning of the "age and maturity" provision. The district court concluded that Marie-Eline did not want to return to France “because she does not want to be subjected to further physical and emotional abuse at the hands of her father.” Id. This is not an objection to returning to France; rather, it is an objection to returning to the custody of her father. Indeed, the record contains ample evidence that Marie-Eline may want to return to France if she is not with her father. For example, the psychiatrist stated that Marie-Eline “loved France and if she could go back to France safely someday, she would love to do so . . . .” (A328). When asked to elaborate on that comment, he stated, “She loves France, but she separates it from the France with her father and the France without her father.” (A335). Similarly, when Marie-Eline was herself asked, “And would you mind going back to France if you did not have to live with your daddy,” she responded, “Yes, I wouldn’t mind.” (A383). When asked if she preferred New Jersey or France, she replied New Jersey, but when asked why, she stated, “because I don’t want to live with my daddy.” (Id.) Again, her focus was on avoiding her father, not France. This is simply not the type of “objection” envisioned by the Convention.

**2.The District Court Incorrectly Applied the**

**“Age and Maturity” Standard**

Even if a child articulates a firm objection to return, a court should nonetheless proceed with extreme caution, and carefully consider whether the child actually has reached the age and maturity threshold required by the Convention. That threshold can be satisfied only where the child has attained sufficient maturity independently to express her own interests in the manner necessary to make a determinative decision for herself. Perez-Vera Report at 433.

In this case, Marie-Eline, now eight years old, was abducted to the United States at the age of six, and has been in the exclusive care of her abducting parent since that time. The Convention applies to children up to sixteen years of age, and Marie-Eline therefore was far below the age of the older children that the drafters of the Convention had principally in mind in drafting this provision. Id. (citing fifteen-year-old as example). At the outset, therefore, there is substantial reason to doubt whether any eight-year-old could satisfy the "age and maturity" standard. Indeed, at least one court has found that this standard “does not apply to a 9-year-old child.” Tahan, 259 N.J. Super. at 335.

This substantial doubt is reinforced in this case by the testifying psychiatrist, who described Marie-Eline’s ability to testify as follows:

I believe that her view can be given great weight when it emerges in a clinical play situation. I believe that the French are correct formally. If you put her on the stand and say do you swear to tell the truth, the whole truth and nothing but the truth, her concept of truth is not as fully developed yet as it will be when she is 12 or 13. . . . [I]n a spontaneous clinical interview I believe you can get valid impressions . . . . Usually what I advise is to do it at the child’s home where the child feels safe, and to take with them some crayons . . . and then to either sit on the floor or sit on a little chair or stool like I do now . . . and to ask them what they would like to play with. As they are playing find out -- for example, one of my favorite ways of doing it is to pretend.

(A336). Similarly, in his report, the psychiatrist stated:

Though we could, and at times did, raise direct questions with Marie-Eline, we were aware that an interview limited to questions and answers could easily go beyond Francois's and Marie-Eline's expected, age-appropriate cognitive capacity. Furthermore, from our clinical experiences, and from published literature, we were aware that direct questions from friendly strangers can be experienced by young children as a test for which the interviewer has a correct answer in mind. The child then tries to please the adult interviewer by providing the "correct" answer . . . .

(A121-22). In sum, her own expert testified that Marie-Eline is not old enough to testify under oath, or even in a question-and-answer format. A fortiori, the child could not be viewed as having a “sufficient age and maturity” under the Convention.

In addition, in weighing the testimony of a younger child, a court should consider carefully whether it reflects the child’s views, or an attenuated version of the abducting parent’s. 51 Fed. Reg. at 10,510. Applying this standard, courts have found that children aged nine and ten have been sufficiently influenced by their abductors that their views on return should not be taken into account. See Sheikh v. Cahill, 546 N.Y.S.2d 517, 521-22 (Sup. Ct. Kings County 1989); In re Robinson, 983 F. Supp. 1339, 1343-44 (D. Colo. 1997).

In August 1998, the district court concluded that Marie-Eline, then seven, had been “prepared, to a degree,” for a conversation with the court concerning her views on return. Blondin I, 19 F. Supp. 2d at 128. Moreover, in December 1999, the psychiatrist readily admitted that some of Marie-Eline’s “spontaneous” expressions of abuse, such as a fear of her father strangling her, or living in a shelter, could have come only from descriptions of abuse given to her by her mother, since such incidents occurred when Marie-Eline was too young to remember them. (A348-50). Notwithstanding this testimony, the district court summarily concluded that it did not believe Marie-Eline's statements were influenced by her mother. Given the circumstances, it is extremely unlikely that Marie-Eline's views could have been sufficiently free of her abducting parent’s influence to amount to an objection properly cognizable under the Convention.

We do not suggest that the testimony of a younger child cannot be considered as evidence that abuse has occurred or that return to the immediate custody of an abusive parent would pose a grave risk of harm. That is different, however, from giving effect to a carefully considered “objection” by an older child to returning to her former country of residence, based on her independent and mature assessment of her own interests.

**CONCLUSION**

T**he judgment of the district court should be reversed.**

Dated:New York, New York

May 8, 2000

Respectfully submitted,

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**Certificate of Compliance**

Pursuant to Rules 29(c), (d), and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for the United States hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6964 words in the brief.

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