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.

The case was then remanded to the district court with instructions to explore ways in which the children could be returned to France yet still be protected from abuse. Id. at 250. In its concluding paragraph, this Court made plain that the district court should deny the petition for return of the children to France only if there were no reasonable means of repatriation that would not effectively place the children in Blondin's immediate custody. Id.

Following remand, the district court sought information on available options in France if the children were returned there. (A60-61). In addition, the district court determined that it would receive evidence on whether the children in this case had now become so "deeply rooted" in the United States that return would subject them to a "grave risk of harm" under Article 13(b), and on whether Marie-Eline had now obtained an age and degree of maturity such that it would be appropriate to take account of her views. (A69-71). On December 20, 1999, the district court held a hearing during which it received evidence as to all of these issues. (A270-409).

On January 12, 2000, the district court issued its opinion. Blondin v. Dubois, 78 F. Supp. 2d 283 (S.D.N.Y. 2000) ("Blondin III"). The district court acknowledged that Blondin, in enforceable undertakings, had agreed not to enforce his right to custody pending new proceedings in France (which could take between one and three months), and had offered to pay for the return of the children and their mother. Blondin III, 78 F. Supp. 2d at 288-89. In addition, Blondin undertook to absorb the cost of temporary lodgings while the mother and children applied to the French government for more permanent housing, financial support, and other social services, and for free legal assistance (all of which Dubois is eligible for). Id. The district court also found that, if there were immediate danger to the children, Dubois could seek an immediate protective order from a juvenile justice in France, granting her temporary custody. Id. at 288 n.5. In addition, the district court noted an agreement by the French government that, if Dubois returns to France, she will not be criminally prosecuted for the abduction. Id. Based on these facts, the district court stated that it had "every confidence in the ability of the French administrative and judicial systems to protect and support [the children] pending the adjudication of the custody case." Id. at 299.

Nonetheless, the district court again refused return based on the "grave risk" exception in Article 13(b). The district court openly questioned the wisdom of the narrow reading given to the "grave risk" provision in this Court's prior opinion. Id. at 297-98. The district court then concluded that, even if it were to apply that narrow interpretation, the standard would be satisfied here because "any repatriation arrangements, including even the return of the children in their mother's temporary custody with financial support by Blondin and French social services, would expose Marie-Eline and Francois to a 'grave risk' of psychological harm." Id. at 285. This conclusion was based on the testimony and report of psychiatrist Dr. Albert Solnit -- accepted by the court in full, id. at 290 -- that separation from their new home and extended family, and return to a country where they were abused, amidst the uncertainties of custody proceedings, would exacerbate the trauma suffered by the children due to the abuse, and would interfere with their psychological healing. Id. at 291-92, 295-96. In addition, "as one of the several reasons why I am invoking Article 13(b)," id. at 296, the district court found that Marie-Eline, at age eight, "'has attained an appropriate age and degree of maturity at which it is appropriate to take account of her views,'" id. at 296 (quoting Article 13 of the Convention). The court added that, "[a]lthough her views are by no means dispositive," 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.

# Summary of Argument

The standard of review to be applied on this appeal should be plenary, as the issues present mixed questions of fact and law, and there is no dispute with regard to the district court's findings of historical and narrative fact. Moreover, appellate clarification not only of the legal standards, but also of their application to the facts, is appropriate. See Point I.A., infra. However, regardless of whether the Court considers the issues to be pure questions of law or mixed questions of fact and law, the result should be reversal of the district court's decision, as it contravenes the purposes of the Hague Convention and the specific direction of this Court. Instead of following this Court's mandate to seek to facilitate return, and in contravention of its own finding that the French authorities could protect the children from future abuse upon their return, the district court adopted testimony to the effect that the children's "best interests" and long-term psychological well-being counseled against their return to the country of France (as distinguished from return to the custody of their father). On that basis, the district court again incorrectly applied Article 13(b) and refused to order the children returned to France. See Point I.B., infra. Moreover, the district court included in its Article 13(b) analysis an erroneous interpretation of the separate Convention provision allowing a court to refuse return based on an explicit objection to return by a child of "appropriate age and maturity." That provision does not make a child's objection part of a "grave risk" analysis, but provides a separate basis to deny return if the requirements of the "objection" provision are met. Those requirements were not met here, as the child did not state an objection to return to France distinct from return to her father's custody. Moreover, the child was not of sufficient age and maturity independently to interpret her own interests and make the sort of determinative decision to which a court might give conclusive effect under Article 13. See Point I.C., infra.

**ARGUMENT**

**THE DISTRICT COURT’S FINDINGS REGARDING THE**

**FRENCH SYSTEM'S ABILITY TO PROTECT THE CHILDREN**

**FROM FUTURE ABUSE SHOULD HAVE LED TO AN ORDER OF RETURN**

**A.Standard of Review**

In Blondin II, this Court did not address the standard of review to be applied in a case such as this, brought under the Hague Convention. In the United States' view, the appropriate standard of review is that applied by the Third Circuit in such cases: "plenary review of the [district] court's choice of legal precepts and its application of those precepts to the facts," with the clearly erroneous standard applied only to "the district court's historical or narrative facts." Feder, 63 F.3d at 222 n.9. Application of this standard would comport with this Circuit's practice in other types of cases raising mixed questions of fact and law.

Ordinarily, this Court reviews the factual findings of the district court under the "clearly erroneous" standard, see Fed. R. Civ. P. 52(a), while legal conclusions are reviewed de novo, see United States v. McCombs, 30 F.3d 310, 316-17 (2d Cir. 1994). This has been the approach of all the courts of appeals to address the standard of review in Hague Convention cases, other than the Third Circuit. See Shalit v. Coppe, 182 F.3d 1124, 1127 (9th Cir. 1999); Lops v. Lops, 140 F.3d 927, 935 n.6 (11th Cir. 1998); Friedrich II, 78 F.3d at 1064.\* However, "[i]n a bench trial, . . . 'where the functions of fact-finding and exposition of law are performed by the same person, the line between the functions is not always distinct.'" McCombs, 30 F.3d at 317 (quoting American Society of Composers, Authors and Publishers v. Showtime/The Movie Channel, 912 F.2d 563, 569 (2d Cir. 1990)). Moreover, "'findings made in the context of a bench trial might be derived from legally impermissible factors, the failure to consider legally relevant factors, the application of incorrect legal standards, or the misapplication of correct legal standards.'" Id. (quoting American Society of Composers, Authors and Publishers, 912 F.2d at 569). Thus, while the reviewing court "'must respect findings of the trial judge as to what in fact happened and in addition . . . give due weight to his superior opportunity to acquire the true feel of the case,'" id. (quoting In re Hygrade Envelope Corp., 366 F.2d 584, 588 (2d Cir. 1966) (emphasis added in McCombs

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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