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)), "'when the issue is [the trial court's] application of a legal standard to facts undisputed or reasonably found,'" id. (quoting In re Hygrade, 366 F.2d at 588 (brackets added in McCombs)), the reviewing court "will not shy away from plenary review" to ensure that the result is consistent with the applicable rule of law, id.; see also Muller v. Committee on Special Educ., 145 F.3d 95, 102 (2d Cir. 1998) (application of statutory and regulatory definitions to particular facts of case is mixed question warranting de novo review).

Moreover, plenary, or de novo, review of mixed questions is particularly appropriate in cases brought under the Hague Convention, because of the need for uniform interpretation, see 42 U.S.C. § 11601(b)(2)(B), and the importance of properly applying the Convention in the spirit of trust and cooperation between States necessary for the Convention's proper functioning, see Blondin II, 198 F.3d at 248 n.7. Where, as here, a court of appeals is as well positioned as the district court to assess whether the facts satisfy the standards of the Convention, and the Court's decision on these issues may have value in clarifying the law, plenary review of mixed questions should be applied. See Ornelas v. United States, 517 U.S. 690, 696-97 (1996) (independent appellate review necessary where appellate court in at least as good position as district court and decision may clarify law).

**B. Article 13(b) Was Not Appropriately**

**Invoked to Deny Return**

Article 13(b) of the Convention permits, but does not require, non-return where “there is a grave risk that [a child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Hague Convention, art. 13(b). This exception is to beconstrued narrowly, and must be harmonized with the Convention’s central purpose of, wherever possible, deterring abductions by returning abducted children promptly, and honoring the treaty commitment to allow custodial determinations to be made by the court of the child’s habitual residence. Blondin II, 189 F.3d at 248. Thus, it is important that a court consider not only whether return would subject the child to a grave risk of harm, but also whether the State to which the child would be returned can and will take steps to ameliorate any potential harms. Id. at 248-49.

Consistent with the above, this Court explicitly directed the district court to consider on remand whether the abducted children could be reasonably protected from the "grave risk" posed by Blondin's abusive behavior "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." Blondin II, 189 F.3d at 248. Because the district court on remand found that the children would not have to stay with their father pending the new determination, that the French system could support Marie-Eline and Francois pending the adjudication of the custody case, and that the French system could protect the children from further abuse, Blondin III, 78 F. Supp. 2d at 288-89, 299, the type of "grave risk" contemplated by the Convention was ameliorated, and return to France should have been ordered, see Blondin II, 189 F.3d at 249-50.

Instead of following this mandate, the district court refused return on the ground that France could not "protect [the children] from the trauma of being separated from their home and family and returned to a place where they were seriously abused, amidst the uncertainties of court proceedings and being on public assistance." Id. at 298. This conclusion was based on testimony from a psychiatrist that any return of the children to France, even for a one-to-three-month period during which a French court would determine custody, would cause them to experience post-traumatic stress disorder due to the prior abuse. Id. at 295. The psychiatrist was of the opinion that psychological harm would be caused by "return[ing] them to the scene of their original trauma" and by placing them in an insecure position based on the uncertainties surrounding a custody proceeding in France. Id.\*

As this Court held in Blondin II, issues of past abuse should not constitute a grave risk of future harm under Article 13(b) without the additional finding that there is a likelihood of, and no adequate option to prevent, future abuse upon return. Blondin II, 189 F.3d at 248-49; see also Tabacchi v. Harrison, No. 99 C 4130, 2000 WL 190576, at \*12-13 (N.D. Ill. Feb. 10, 2000) (return ordered where Italy can protect child from alleged abuse); Croll v. Croll, 66 F. Supp. 2d 554, 561 (S.D.N.Y. 1999) (same with respect to Hong Kong), appeal pending, No. 99-9341 (2d Cir.); In re Walsh, 31 F. Supp. 2d 200, 206-07 (D. Mass. 1998) (same with respect to Ireland); compare Turner v. Frowein, FA 970084450, 1998 Conn. Super. LEXIS 3781, at \*17-21 (Sup. Ct. Conn. June 25, 1998) (refusing return where court found sexual abuse of child by father, and Dutch authorities were not responsive to mother).

The district court criticized this Court's interpretation of Article 13(b) as "unduly narrow" and "unwarranted." Blondin III, 78 F. Supp. 2d at 298. In support of this criticism, the district court analogized this case to a portion of a State Department legal analysis that was published when the Convention was first adopted here. Id. at 298 (citing 51 Fed. Reg. 10,494, 10,510 (1986)). Under that analysis, sexual abuse of a child by one parent is an example of an "intolerable situation" permitting a court to deny a petition for return. This analogy was flawed. The Department of State has confirmed to us that the example assumes (as did the district court in its initial ruling in this case, 19 F. Supp. 2d at 127-29) that the return would be to the custody of the abusive "custodial parent." 51 Fed. Reg. at 10,510. The example did not consider the additional possibility of return in the custody of the non-abusive parent, or of other alternative arrangements to protect the child in that situation.

The district court also erroneously concluded that, even under what it regarded as this Court's "unduly narrow" standard, a grave risk of harm had been established. Blondin III, 78 F. Supp. 2d at 299. The district court believed that its findings of past abuse made this case exceptional, and warranted its acceptance of expert testimony regarding the children's emotional ability to adjust to a return to France. Id. at 297. Both portions of this conclusion were incorrect. First, while allegations of abuse are not always made, invocation of such allegations is becoming more ordinary as "parents attempt to stave off return orders in the name of the child's welfare." Linda Silberman, Hague International Child Abduction Convention: A Progress Report, 57 LAW & CONTEMP. PROBS. 210, 267 (Summer 1994). Moreover, much of the testimony credited by the district court was primarily addressed to the psychological harm that may flow to the children based on the uncertainties of custody proceedings in France. See 78 F. Supp. at 295-96. The district court acknowledged that uncertainties are inherent in any custody proceeding, id., but then failed to appreciate that crediting such uncertainties, even those existing against a background of past abuse, as a basis for non-return under the Convention expands the "grave harm" exception to the point where it threatens to undermine the central goal of the Convention, namely, the prompt return of abducted children to their 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,

MARY JO WHITE,

United States Attorney for the

Southern District of New York,

Attorney for Amicus Curiae

United States of America.

WENDY H. SCHWARTZ,

GIDEON A. SCHOR,

Assistant United States Attorneys,

Of Counsel.

**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.

MARY JO WHITE,

United States Attorney for the

Southern District of New York,

By:WENDY H. SCHWARTZ,

Assistant United States Attorney